ROYAL COMMISSION ON MATTERS OF HEALTH AND SAFETY ARISING FROM THE USE OF ASBESTOS IN ONTARIO

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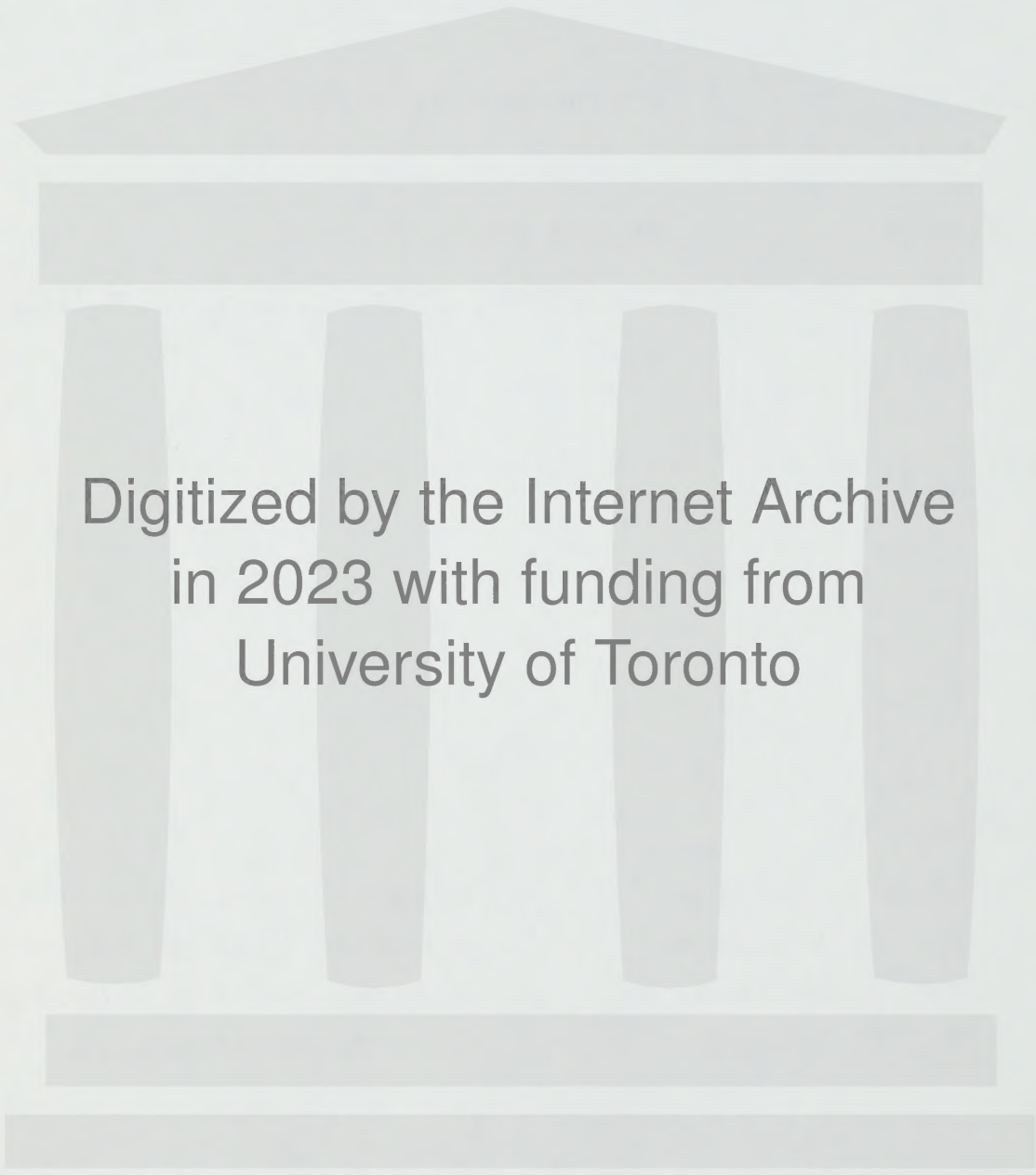
180 Dundas Street
Toronto, Ontario
Tuesday,
August 24, 1982

VOLUME 57



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THE FURTHER MATTERS IN THIS INQUIRY
RESUMED PURSUANT TO ADJOURNMENT.

APPEARANCES AS HERETOFORE NOTED

DR. DUPRE: May we come to order, please?

This morning the Commission very warmly welcomes Dr. Peter Barth, professor of economics at the University of Connecticut, the author of the Commission's study on workers' compensation and asbestos in Ontario.

Miss Kahn, would you swear in the witness, please?

DR. PETER S. BARTH, SWORN

EXAMINATION-IN-CHIEF BY MR. McCOMBIE

DR. DUPRE: Now as I understand it, counsel, the parties will open the questioning, and there exists a batting order?

MR. LASKIN: I believe that's correct, Mr. Chairman.

DR. DUPRE: Mr. McCombie, are you leading off?

MR. McCOMBIE: Yes.

DR. DUPRE: Mr. McCombie, if you please.

MR. McCOMBIE: Q. Professor Barth, maybe you could start...we could start by your giving us a little bit of background as to your involvement with workers' compensation over the last few years. I understand you were involved, for example, with the...I

Q. (cont'd.) believe it was the 1974 study, American federal study of the compensation system.

Could you just briefly fill us in on your involvement?

THE WITNESS: A. It goes back to 1971. There was a national commission called the National Commission on State Workmens' Compensation Laws. It was the first time that the U.S. federal government had a commission inquire into the status of state workers' compensation...at that time workmens' compensation... laws.

I was the executive director of the commission. The commission lasted for slightly over one year, and I was the executive director during that entire period.

As the executive director, I had the principal responsibility for staff, for research studies, for co-ordinating say all of the activities of the commissioners and the commission, and was instrumental in preparing some of the publications and in helping to draft the report of the national commission. The law is not a principle in the drafting of that report.

In 1975, possibly late 1974, I was commissioned by a followup group known as the Interdepartmental Task Force on Workers' Compensation, to prepare a study on the status of occupational disease in the United States - the status of occupational disease with respect to workers' compensation.

That resulted in an unpublished report prepared for the task force of the U.S. government, that was revised and modified by me and became a book published in 1980.

The major difference between the 1980 book and the 1976 report was that it followed on the heels of visits that I made to seven countries in western Europe and to Ontario, in 1976, to inquire as to the manner in which workers' compensation dealt with the problems of occupational diseases or industrial diseases.

In 1980, I was asked by the department of labour of

THE WITNESS: (cont'd.) the U.S. government to prepare a study on the use of medical channels as a method or as a way to resolve disputes in matters of industrial or occupational diseases in Canada, and that brought me to Ontario for the second time, although Ontario did not have such review panels.

It took me, though, specifically to visit with the commissions in British Columbia, Saskatchewan and Manitoba.

In 1981...I'm sorry if this is more of an answer than you had wanted...but in 1981, I prepared a study on the experience in the U.S. There were fragmentary data from Canada, very, very heavily dominated by the U.S.

The experience of survivors of asbestos workers, specifically members of the asbestos workers' union, which is the Insulation, Frost, Heating and whatever, but known as the asbestos workers...on the experience of the survivors of workers, of men...and it was all males...who had died from asbestos-caused diseases. I point to that only because that gave me yet another opportunity to look at both workers' compensation and specifically the area of asbestos.

Around those, there have been some other things that I have done in other employments and whatever, but I think in respect to your question that kind of fills out, perhaps, how I got to Ontario in 1981.

Q. Maybe just to follow up for a minute the last point you made on the study and the experience of survivors, in your report to this Commission you deal with the question of whether the system is as universal as we would like to see it being, in that everyone who has a potential asbestos claim gets to the compensation board.

I am wondering if that was part of the mandate of this study you mentioned on the experience of survivors.

A. I would have to say, Mr. McCombie, it was the

A. (cont'd.) principal interest of mine in that study. The reason was, that in the book that was published by MIT Press, the theme that ran through it...I hope again and again, I meant it to run through again and again...was the issue, ultimately a question on which I was an agnostic, a question of why is it that there appear to be so very few workers' compensation claims - forget whether they are successful or not - for industrial diseases, when the medical community, the public health community, the epidemiologists are telling us there is an explosion of industrial diseases, there are diseases of epidemic proportions that arise out of the workplace, and yet if you talk to the old pros in in the workers' compensation field...and I hope I am not one of them, certinly not by dint of age...they say this is a trivial problem, we don't see very much of it, there are very few instances.

So in the study that was done on survivors, we had just an absolutely unusual and perhaps once-in-a-lifetime opportunity to confront that, because what we could do was we could focus in on persons who were members of an asbestos workers' union - the asbestos workers' union - the association with asbestos, then, could not have been more obvious - workers who were deemed by perhaps the foremost or one of the foremost medical authorities in the area of asbestos to have died of asbestos-caused disease. That is, in each case Selikoff first identified each victim, each individual in our group, as having died from asbestos-caused disease.

So what we had was the opportunity to say, look, these people, at least, we think should have come to workers' compensation. All right? They all came from states or provinces where there was such a system, they were asbestos workers, and here we have the foremost authority or one of the foremost authorities saying John Smith of Alabame Local such-and-such died of

A. (cont'd.) mesothelioma; Jack Jones of Sarnia died of lung cancer that I believe was work-connected, and then in those cases we were able to get back, sought to go back and ask the survivors 'what did you do, what was your experience'.

In part, what we found was what we expected - that a very, very large, hefty proportion did not seek compensation, did not pursue lawsuits - third party actions - and then, Mr. McCombie, were able to ask the followup question, 'why didn't you? What were the things that were associated with your not doing what the law seems to entitle you to do?'

So again, that may be much too long-winded, but that has been an overriding concern of mine for as long as I have looked at the disease issue.

Q. I would gather from your response, then, that you are...and I don't want to put words in your mouth, but I gather you are still of the opinion that, at least from your experience in the States anyway, that there are still a large number of victims of occupational disease that are not getting into the system adequately.

A. That's correct.

Q. Can you make any comparison in that to what you found in studying the Ontario system? Or would that be speculation?

A. I would like to answer it, and I will say first that part of it necessarily is speculative.

Asbestos is different than many other hazards of the workplace, and one of the reasons that it's different is, certainly in this province and in some of the states, that the media have given considerable exposure to the issues of disease associated with exposure to asbestos - which is to say that my hunch, my very strong hunch, is that the problem that we are speaking of, the fact that people apparently are not using the compensation system in a manner, in a way to which the law entitles them to and

A. (cont'd.) which one would suppose that they should, the problem is very likely better in the asbestos area than it is in many others.

Now, that speaks principally to people whose exposure to asbestos tends to be fairly obvious - laggers, asbestos workers, employees of the Johns-Manville Corporation - not to pick on any one firm - but there people have an awareness that there is an exposure to a hazard, and similarly I believe with the publicity and the information that has been disseminated there is some sensitivity to it.

I believe there is less awareness of other hazards. There is less awareness of the asbestos hazard as one moves down the production stream - say to the manufacturing side. There is probably even a lack of it in construction when you deal with those employees and those persons who are not asbestos workers but who can be exposed to the hazards that asbestos workers may be protecting themselves from because of their sophistication, experience, education or whatever.

So I don't want to make it sound as though asbestos is very good. It may be, but my hunch is that it's better with respect to that issue than most of the other industrial hazards that we are aware of...we meaning people who have had some concern about it.

Q. Okay. I would like to turn now to the report and I guess the first question that I have and one of the things that concerned me somewhat in the manner in which the report was prepared, and I'll put this to you: You do list the sources that you gathered for...the sources that you used to gather the information from for the report, and I'm just curious as to whether or not you considered interviewing any asbestos victims, and if you did, why you didn't follow through with that because it's indicated in the report that there was no workers that were

Q. (cont'd.) interviewed, no claimants.

A. Right.

Well, I can't say that I considered it very seriously, and the reason was a matter of timing. There was, as you know...I attempted to speak with and I think I spoke to many of the individuals who represent groups, from which some of those workers are drawn - which is to say some union people, injured workers groups and the like, asbestos victims groups, and other representatives.

My concern in speaking to workers was that it would be...I would have a great deal of difficulty finding a representative group, short of going to a very, very large number of them. I didn't really know how much information I would get from a given interview, that what I might get was...oh, how should I put it? I thought there would be very limited benefits - not to say negligible or nonexistent, but that in terms of the inevitable tradeoff of one's time, that it would be better for me to go through, say, the files claims, than it would be to talk to the workers themselves - and hoped and felt that individuals who represented those workers could perhaps better characterize what a preponderance of opinion was by those workers regarding their treatment and regarding the system in general.

Q. So you wouldn't agree that in reviewing any structure such as a workers' compensation board that it would be extremely important to get the input of the client group, if you will, of that organization as to perceptions, and we'll leave aside for the moment whether they are correct or not...but perceptions of the treatment that these individual clients receive? You felt, given time constraints, that that was fairly low down the list of priorities?

A. Well, and moreover, I felt that the individuals

A. (cont'd.) who I spoke to who came from the labour movement, as well as those groups of workers who had organized injured workers groups, asbestos victims groups, those individuals who spoke for those organizations could perhaps better characterize for me what the circumstances and conditions of those workers were than I could on the basis of perhaps fragmentary interviews - fragmentary not in the sense of short interviews, but based on a sample that would be necessarily very limited.

Q. Okay. A couple of other issues that arise in the report, and I guess these are things that concern me in particular and I would like you to perhaps address some of them, and perhaps keeping in mind your experience in the United States, and I gather that you have read the critiques of your report from...that have been submitted to the Commission?

A. I have.

Q. I would refer in particular to Professor Eissen's critique, in which he deals with the question of adjudication and whose role adjudication is, and lays it out on the table at page ten of his critique.

Using this as a very broad background, my understanding from your report, and indeed from a lot of the testimony that we've heard here, is that the medical people at the Compensation Board and the members of the advisory committee on occupational chest disease are the real key people in determining whether or not a claim is accepted and what the degree of disability is, and certainly my impression is that they are virtually the only people who make that decision.

A. Could I correct two parts of that, and I agree with you?

Q. Sure.

A. One is that their role is certainly that in the asbestosis cases, as opposed to all the asbestos cases.

A. (cont'd.) It is that in the case of asbestosis when it is referred on to them from the medical services division.

As you know, not all asbestos claims go there, but when they do I would agree.

Then I would also quibble only with the choice of the word 'disability'.

Q. We will get to that.

A. All right. But their role is to identify extent of impairment.

Q. But I guess my point being that it's either the medical services division at the Compensation Board or the ACOCD in any asbestos claim, will ultimately make the decision as to compensability and degree of impairment?

A. With the exception of those surprisingly rare instances when appeals are made, and when that occurs it almost takes on...the claim takes on a life of its own. It is less routine, less automatic that the decision of the ACOCD or of the medical services division will fly through.

As a general rule though, there is no question that you have either read my report and assimilated it, or that your understanding and mine are the same.

Q. Well, given that and given Professor Eissen's table in which he deals with his suggestion as to how adjudication should take place and...well, not wanting to interpret Professor Eissen, certainly it's clear to me that he is indicating that there should be a much more active role from the nonmedical side of things in determining some of these questions, and I'm wondering if you have any comments on his comments.

A. Well, unfortunately, I'm handicapped because I haven't had a chance to review this since I received it. I looked at it briefly.

But I will say this, that I'm not unfamiliar with the

A. (cont'd.) argument, and I'm not...or I came across it most vividly when I did spend some time in British Columbia two summers back, the summer of 1980, and where this issue where Eissen prepared some papers for what at that time was his Commission, and laid out what I think are similar kinds of statements. I say 'I think', because I haven't reviewed this sufficiently, Mr. McCombie.

His view is, if I understand this, recall this properly, that there should be a very, very strict limitation...we should be very strict as to what we expect to get from the medical profession. It is the obligation of the Board to pose questions, pose questions of a medical sort. They should be very precise questions, and the medical people should respond only to those questions.

Is that understanding...

Q. That is my understanding of Professor Eissen's work.

A. Right, and that's what he summarized here in this section.

My attitude toward that was, who can quarrel with that. That's laid out, though, principally in a world of medical review panels. That is, these statements that he has made...at least that he has prepared in writing...were done in terms of 'how does this Commission of British Columbia live with our medical review panel system', and my recollection is that the statements were prepared in such a way that the Commission had the responsibility of dealing with its medical review panel in that way.

On the other hand, there is a staff physician within the compensation agency in British Columbia. My understanding is that he performs a role that is not terribly dissimilar to the kind of mixed role played by the medical services division and the ACOCD. All right? And that the approach there is somewhat

A. (cont'd.) less rigorous in terms of delineating medical issues, medical responsibilities, medical expertise and only that, from all the other questions. So that separation is very clear with the MRP, I don't think it's quite so clear in terms of how the practice is, how the system is actually administered in those cases that don't involve an MRP.

Q. I gather from what you are saying then that your experience has been that it would be very difficult, at least at the initial adjudication stages, to limit to any degree the role that doctors either directly employed by the Board or advisory to the Board play in determining claims and determining level of impairment?

A. In the case of asbestos and the diseases that follow from exposure to asbestos, as I'm sure you are aware, the principal questions that confront a compensation board or commission are questions of etiology, questions of diagnosis, and then what confronts a board in almost every serious injury or disease case is the question of the extent of...now, the word that follows is important.

All right. Now the question of etiology, the question of diagnosis I regard to be as absolutely legitmately and inevitably medical questions.

I could qualify the question of etiology slightly by saying in a world with guidelines there is some difference there, but in a world where we don't adhere to rigorous guidelines, where each case is viewed on its own merit, the question of etiology, the question of diagnosis are medical questions, and I have no quarrel with that.

Now, if the issue is 'extent of', if it is extent of impairment, that is a medical question and I am prepared to see that in the hands of the medical community....I shouldn't say 'prepared to see that'. It makes sense to me that those questions

A. (cont'd.) are placed in the medical form, and ideally resolved there.

In a world in which the issue is extent of disability, it would be dreadful if that were decided upon by the medical profession. The medical profession has no special expertise or skill or experience in determining that. They can identify certain factors that would be helpful in evaluating disability, but those would be an input, certainly not their decision to make.

Q. And from your review of the system in Ontario, would you say that what is compensated in Ontario for asbestos claimants is the extent of impairment rather than disability?

A. I would say it is the former, but on occasion the latter creeps in.

Should I say that again? I would say that the goal that they aspire to is to measure the extent of impairment.

On occasion, my sense is that the notions of disability that creep in, and 'they' does mean the ACOCD or the medical services division.

Q. But the...sorry, go ahead.

DR. MUSTARD: I would like to ask two questions on this subject.

MR. McCOMBIE: Well, let me just finish up one thing.

MR. McCOMBIE: Q. But the ultimate result for the worker is that the worker is compensated? I mean, whether it's from the ACOCD or the Board, the worker is compensated on their extent of impairment rather than on their extent of disability, in most cases?

THE WITNESS: A. That's correct.

MR. McCOMBIE: Dr. Mustard?

DR. MUSTARD: I wanted to go after your use of the word etiology and the word impairment and the role of the medical profession, if I could.

DR. MUSTARD: (cont'd.) I think you said that their role would be important in determining etiology, but personally I will oppose it if that's right. Is it really, that really...should that really just be left to the medical profession, because you are really talking about the question of evidence and this field of association between exposure, epidemiology data, and you don't have to be an M.D. to do epidemiology, etc., which really is determining the association, and there are a lot of judgement factors that come in in terms of what a person is exposed to, probabilities and things like that.

Would you be hard and fast to say that it really had to be strictly a medical opinion, or could it be broadened out to anybody who has some understanding of looking at evidence and trying to determine the relationship between the evidence and effect?

THE WITNESS: If the individual were trained outside of medicine but in some other form of health science, I think the question of etiology could be dealt with by that sort of individual.

I don't know why it would need to be done by just M.D.'s, but some of the questions, I think, are of a sort that M.D.'s are probably better equipped, as a single profession, than any other to cope with it.

Epidemiologists may not be at all equipped to deal with these issues on a case-by-case or individual basis....ideally equipped to do it on an aggregate basis, to determine whether workers from a given industry, from a given region, from a given cohort have tendencies to have an excess incidence rate or mortality rate, based presumably on some exposure or some intervening factor, but on a case-by-case basis, no, I'm not aware of special skills that epidemiologists would have in that regard.

DR. MUSTARD: Well, I guess I take the case-by-case as making the diagnosis, yes, the person has chronic chest disease,

DR. MUSTARD: (cont'd.) or yes, the person has lung cancer, but then the evolution of causation becomes complicated because if you ask me 'could this have been caused by exposure to asbestos' - yes, although I think the probability is I will give you a value. But I guess the question I'm trying to get at, I get into the uncomfortable setting you are starting to weigh values, which doesn't make me a great deal different than a lawyer, and once I know what the cause is and what the possible causes are.

So I take it that you feel fairly firmly that maybe individual cases should be the physician, and I guess I am raising the question that I have a certain...I am a bit uncomfortable when you are trying to make attribution of actual cause, because of the probability question.

THE WITNESS: Mmm-hmm. Well, you are saying that many of these questions involve more art than science, more guesswork, and if we are into that kind of world, why leave it to the...let somebody else do the guessing or let someone else practice the art, if I understand your question.

DR. MUSTARD: Or not let the dogma of medicine be considered to be actually absolute. Try to recognize that there is a range of judgement involved in medicine, that other people could actually take a slightly different judgement given the same information.

THE WITNESS: I agree with you.

DR. MUSTARD: Then my seond thing is, in the question of impairment one of the things that one has observed in the testimony so far before this Commission is that the medical assessment of impairment seems to be entirely based on a physical measurement of change in lung function, etc., and there does not appear to be any attempt to take into account the impairment to the

DR. MUSTARD: (cont'd.) individual in terms of attitudinal change, and the best example I know in the practice of medicine is that if you take a person with high blood pressure, who does not have any clinical manifestations of the elevated blood pressure, and now tell them they have high blood pressure, you change their attitude substantially and their absenteeism from work goes up. It goes up in a fair proportion of the members of the work force.

We know as physicians that if you take someone and tell them that they have a disease which they know is likely to shorten their lifespan, that substantially changes their attitude. For some of us that creates an impairment.

Now, the question which I pose to you is that the way things have been set up in the testimony that we have listened to, that the impairment question seemed to be primarily focused on the physical impairment. There does not seem to be any measure taken of the impairment as created by the attitudinal change of being given the label of a disease process which most workers instinctively understand will shorten their lifespan, and do you have any views on that? Are there any organizations which take it into account, and if it should be taken into account in looking at disability and arguing that it's an impairment, should that be medically based or should it be based more broadly than that, by other groups looking at it?

THE WITNESS: Well, the answer to your question is, I'm not aware of any instance where it is taken into account. Certainly...

DR. DUPRE: Where attitudinal impairment is?

THE WITNESS: Attitudinal impairment is.

There is an exception, an extreme exception to that - very rare - but that would be, for example, in horror stories, but where an individual is perhaps told that there is an impairment,

THE WITNESS: (cont'd.) and the individual then commits suicide or commits some other act which further impairs them or undermines them, and that in the hands, at least in an adversary system, in the hands of an appropriate representative of that victim, certainly attempts have been made, and on occasions, rare occasions, have succeeded in linking the original impairment with the product of the attitudinal change.

Now, that tends, as one might suppose, must suppose, to be rare and very limited - and extreme, obviously very extreme.

But I'm not aware of that.

Now, the line is drawn, then, between that, the impairment approach, and disability. If you are right, if the individual in fact...I don't say 'if' in a quarrelsome sense...but if you are correct, if the individual in fact does suffer, for example, some loss of work time, perhaps less job stability as a consequence of some impairment, if that impairment arose out of the course of employment, if it was work-connected, in a disability approach, in a strict disability approach, moderately strict approach, yes, the argument could certainly be made that here is an individual who suffered an injury, his track record now is increasing instability in work, reduced earnings and the like, then you would certainly have grounds for arguing that compensation then should be...and is in fact...increased accordingly.

But the word might well be the argument for, it's not automatic even in that situation.

MR. McCOMBIE: Q. I would like to touch briefly, too, on the question of etiology and I think it raises the...I guess the policy issue of statutory presumptions, and I'm just wondering, from your experience both in the Ontario study and in the States, I am wondering what your feelings are on having the equivalent of a scheduled disease and laying out very specifically that under

Q. (cont'd.) certain circumstances the presumption is that the disease is work-related unless the contrary is shown.

Could you briefly comment on that?

THE WITNESS: A. Well, I don't think I can briefly. But I am on the record, Mr. McCombie, as very supportive of the use of those kinds of explicit presumptions where possible, and I have even taken what I guess in some forms is an extreme position, thought of as extreme, but I cannot understand why, but where those presumptions could be positive and negative presumptions.

But that, of course, is done...those recommendations flow in an environment, in my country, where there appears to me to be an inordinate amount of resources going into the process of litigating claims, and where decisions are frequently made on what I would regard to be capricious bases. To get more consistency, to get more horizontal equity...my jargon now - equal treatment of equals, people with similar kinds of situations should be treated similarly - hopefully the right way, with quotes around that, but minimally they ought to have the same treatment under law and under compensation.

I think guidelines of the right sort can be very helpful in that respect.

Q. I'm sorry. Guidelines can be very helpful as opposed to statutory presumptions?

A. No, no. I'm not quibbling between...then I missed the gist of your question. I was simply saying whether it be statutory presumptions or guidelines...that is, I am supportive of that. I am not distinguishing between the two. Apparently you are in your question, are you?

Q. Well, I guess the reason I am distinguishing is from the experience that we have seen in the Ontario Board in that, if I can very broadly classify them, the presumption, the statutory presumptions are very clearcut and don't deal with

Q. (cont'd.) length of exposure and latency periods and things of that nature, which are, arguably anyway, judgement calls. They just set forth fairly straightforwardly that if there is exposure and if there is a diagnosis, then the presumption is that it's work-related. Whereas the guidelines flesh that out a little bit, if you like.

A. Can I quarrel with you on that just a bit?

Q. Sure.

A. There is no reason that I am aware of why a statutory presumption couldn't include very specific numbers of the sort that you are referring to.

In my country, under federal law we have that precisely in the black lung program - very precise numbers, very precise statutory presumptions of the sort you are identifying as characteristic of guidelines and not statutory presumptions, so you can find that similarly you could think of guidelines - you could have a guideline of a sort that you have looked at and seen here, that have no numbers, that could be very, if you want, vague or...and that isn't meant in pejorative terms, it's just that they be imprecise or they be nonquantitative.

So if the line you are drawing is between that numbers, years, I think it's artificial. I would prefer...it would be easier for me to respond to that than to say well, I prefer statute to guidelines, because there seems to be a one-to-one correspondence between a presence or absence of these numbers.

MR. McCOMBIE: Dr. Dupre has a...

DR. DUPRE: Just to follow up on this, Professor Barth, I will simply take it as your starting point that guidelines and/or statutory presumptions are very useful means of trying to achieve horizontal equity.

THE WITNESS: I think so.

DR. DUPRE: Now, I'm interested in pursuing with you

DR. DUPRE: (cont'd.) the question briefly, if I may, of whether there is a difference between using guidelines and using statutory presumptions, whether the two should go hand in hand or whether you can rely much more on guidelines and let statutory presumptions go.

The reason I just want to pursue this is, you know, if I can just review the Ontario scene briefly to refresh your mind: The statutory presumption with respect to industrial disease is found in section 122, subsection 9 of the Workmens' Compensation Act, which tells you that if the employee at or immediately before the date of the disablement was employed in any process...it's there at the top of page sixty-one there...mentioned in the second column of schedule three, and the disease contracted is the disease in the first column of the schedule set opposite to the description of the process, the disease shall be deemed...etc.

THE WITNESS: Right.

DR. DUPRE: Well, when we bear asbestosis in mind, what we find when we turn our attention to schedule three is that schedule three is, in effect, completely useless, and the reason why schedule three is completely useless is that you have only one of the two columns filled out. The column that is filled out, if you just look at page eighty-three of the text, is the pneumoconioses other than silicosis, and there is nothing under column two, process.

Now, with respect to the testimony that we have had from officials of the WCB, subject of course, you know, to my reviewing it more carefully than I already have, what has come across to me and what I must assess is that over the last several years, and maybe indeed we are talking about a couple of decades, the Board, perhaps for good and sufficient reason - I am going to have to review that - has come to find that guidelines are a much more effective way or pursuing horizontal equity than statutory

DR. DUPRE: (cont'd.) presumptions.

Indeed, one statement that was made before us by one of the Board officials has stuck in my mind, which is that the year in which the Workmens' Compensation Act was amended so as to make it possible for the Board to make changes in schedule three, just about coincided with the time when the policy directions that the Board was working out in terms of how to cope with industrial disease involved downplaying schedule three and getting away from these statutory presumptions and going to guidelines themselves.

Now, it's with this Ontario-specific problem in my mind that I guess I put to you the question. In your view is it reasonable to entertain the pursuit of horizontal equity through an exclusively guideline type of approach that involves a little or no reliance on statutory presumptions?

THE WITNESS: My answer to that is, in this environment I would have as much confidence...I believe you can do as much with guidelines as you can with statutory presumptions, and the reason that I have preference for the former rather than the latter...

DR. DUPRE: And the former and the latter is...

THE WITNESS: The reason I would prefer the guideline approach is the following: You have to appreciate, as some of you do, that as an American part of my view is largely shaped by the American experience. It was the height of heresy for a reformist, as I was viewed in the States, to argue that we should develop schedules...schedule or guidelines, let's not quibble or argue now over which this is...because in fact in the report of the national commission one of the essential, one of the nineteen essential recommendations is that there shouldn't be any limits to occupational diseases that can be compensated, and one of the ways that states were limiting compensation to occupational disease victims was, they had a schedule - usually put in,

THE WITNESS: (cont'd.) invariably put in by state legislature, and individuals who by any sound, honest stretch of the imagination had a legitimate claim were having those claims denied because the disease didn't happen to appear on the schedule.

So the thrust in the sixties and seventies was, let's get rid of these damn schedules because they are being used as a way to exclude people who have legitimate claims.

I say that only by way of background, why it's so heretical for someone like myself to say I think we should go back to them, I think we made a mistake by persuading all the states to get rid of them.

The problem with schedules and the problem with doing it through legislation has been, in part, that they change too slowly. You can't count on a parliament or a legislative assembly or a state assembly or state legislature to change a scientific wisdom - with quotes around it - as new insights from the medical and health and epidemiological community come in. You can't expect a regular, responsive behaviour from those groups.

Now, I wish it were otherwise, and maybe your experience in Ontario is otherwise, but my guess is that it is not - based on looking at this, looking at your law and looking at the manner in which presumptions have been added in the schedule.

I don't see that kind of regular updating and attempt to be at the forefront of what science has unearthed.

Now...all right.

DR. DUPRE: Let me fill you in on something at this point, Professor Barth, if I may.

THE WITNESS: Please.

DR. DUPRE: I have a feeling that we don't know the answer to your question in Ontario, and the reason for that is the following: We amended the Workmens' Compensation Act to make it

DR. DUPRE: (cont'd.) possible to change the schedule without any reference to the legislature.

There is one kicker which is in the Act, as I understand it, and that is that a change in the schedule, which would be recommended by the Workmens' Compensation Board, requires the approval of the Lieutenant-Governor in council or provincial cabinet. Possibly as such it might involve some review by a committee on statutory instruments.

Whatever the case, the fact of the matter, as I understand it, is that we did at least simplify the manner in which changes in the schedule could be achieved. But precisely because this coincided with this change in policy direction that I mentioned, that the Board, for reasons that it apparently deemed good and sufficient, was going to follow a guideline approach, well, there has been basically almost no change in the schedule, as I understand it, ever since it was made easier to change the schedule.

THE WITNESS: But we don't need to look exclusively in this area. Your experience, your professional experience here in Ontario might allow you to generalize about the rapidity with which the legislative process can cope with new information of a technical sort. Forget workers' compensation. How about in other areas where there are issues that are technical, that are scientific and that are changing, where our knowledge changes.

In my experience, limited to the States, it has been that either they were unable or unwilling to change, and so it might have been an acceptable schedule in a state in 1930, and turned out to be fully unacceptable and virtually unchanged in 1950.

Now, those kinds of experiences necessarily cause individuals such as myself to say, look, if that's the best they can do, get rid of the damn thing.

THE WITNESS: (cont'd.) The other...and it should be made explicit...the other concern is, again you are far better equipped than most to deal with this...the question would be to what extent would decisions of this sort be based on exclusively unpolitical considerations, on the political lens, on an election coming up, on intraparty fighting as well as interparty fighting, which is not to say that the guidelines are necessarily, as they have operated, been absolutely perfect. Our report suggests there is some problem. I believe there's some problems there, but I think the other question - the principal one I have is the ability to change, the ability to respond to new information as it develops, walk under the technical sword in the scientific community, in the health community...and I would like a schedule or guideline to be pretty damned responsive on the grounds that that if it's not, individuals might find that they are simply... that they are effectively barred from access to compensation.

But the second issue, and it's a trickier one, is do we just throw this thing out and it becomes a political football? Do I let your disease go on the list if you let my disease go on the list, and if you settle for nine years can I get you go up to sixteen on the one that I'm more worried about?

Well, I don't want to make that judgement. The implication of my statement is that it's something that we ought to have some sensitivity towards.

DR. DUPRE: Can I pursue that a bit, if I may?

I take your preference for the guideline approach. I also take the point that is made in your study that the process of setting guidelines in Ontario has perhaps been an excessively slow process, has not been open to submissions from personnel outside the Board. Is that a fair inference to...

THE WITNESS: Certainly it is a fair inference. Whether the Board would accept that or not, certainly that is a...

DR. DUPRE: No, I'm asking that as a fair inference for me to take away from your study.

THE WITNESS: I hope you do.

DR. DUPRE: Now, in that I take this inference...as indeed I have taken it since first reading your study, Professor Barth...I start casting around for possible remedies. Such a remedy, for example, might take the form, let us say, of industrial disease guideline panels. This would be a new inhabitant of the panel zoo, quite distinct, of course, from the medical review panel species.

Now, as I take it, an industrial disease guideline panel would be, I guess, constituted with individuals who have suitable expertise, perhaps largely, but in deference to Dr. Mustard, not exclusively medical, and as I would take it, such a panel, if you posit its existence in something that would approximate the real world, would have, of course, scientific input from its staff and experts, but it would be open to submissions from interested parties either in the first instance or in reaction to, let us say, a draft guideline that could be published.

Now, I start to find industrial disease review panels, industrial disease guideline panels, appealing as I try to prescribe for the ailment which we have diagnosed in our current guideline-setting procedure. I find it appealing until I start, then, to ask myself about the very political process which you say can plague the setting of schedules for statutory presumption...one party will bid for nine years, another party before the panel will bid for sixteen...you can, if you will, wind up with perhaps running the risk of industrial disease guidelines that basically have a great deal in common with conciliation or arbitration board reports.

I'm not sure that's necessarily a bad thing, but

DR. DUPRE: (cont'd.) I put this dilemma before you for whatever help you can give me with it.

THE WITNESS: Well, if by help you mean is there some way that I could visualize designing such an IDGP that would develop a product that would always be perfectly sound scientifically and apolitical, then I'm afraid I cannot help you. There are politics in the world, no doubt, but I still would prefer guidelines to the legislative approach, and the IDGP's if the decision, if the ability to make the decision to formulate this guideline, perhaps with approval by the corporate board of the WCB, perhaps something even higher, so long as the process weren't unnecessarily slow and cumbersome. If the principal decision could be made by individuals from the health community...and here, very explicitly not just physicians, I have been through this debate before and have been persuaded that certainly physicians should not be the exclusive participants in such a panel...my feeling is that it is inevitable that politics will creep in one way or the other, but that professionalism may still win out, or the preponderance of outcomes will be heavily weighted towards best professional wisdom rather than simply politics, and I have a visceral feeling that that outcome is less likely to occur in a fully political forum such as a legislative assembly or a state legislature or congress or parliament.

Having said that, you have avoided asking some of the tough questions about how one designs such an IDGP, but I'm sure if we...

DR. DUPRE: I've got one right now.

THE WITNESS: All right. There are plenty of them. There are plenty of them, but because they are tough questions is not to say that we should somehow be put off by the challenge or we should simply leave it as it is, because these were tough.

DR. DUPRE: Well, to put to you just one question, and

DR. DUPRE: (cont'd.) I thank you for the extent to which you have already overindulged me, Mr. McCombie, but to put just this one question to you, Professor Barth, I can envisage on the one hand equipping the workers' compensation agency with a single industrial disease guideline panel, a group which once empanelled will, among other things, determine its own priorities as to which diseases should be looked at in terms of setting guidelines first.

On the other hand, I can envisage a situation in which the workers' compensation agency or board is simply authorized by law, from time to time, to appoint such industrial disease guideline panels as it wishes, to set guidelines for a particular disease, in which case, of course, it will be the corporate agency itself that makes some initial determination of which disease you should try to set guidelines for first.

Do you have any feeling for which of these two models may be preferable?

THE WITNESS: Well, I'm on very shaky ground because I have not been in a position where I have had to think through this question with much care, but my preference would be to do some of both. Which is to say, to think of having perhaps a permanent panel in place, a panel composed of highly-respected distinguished individuals from a state or a province or a nation, and that upon either their own judgement, based on their own experience or collective wisdom, or because of solicitations to them either from the board or from workers groups or others in the science community or whatever, that they could then create, say, a special committee, which need not be drawn from anyone that is a member of their own individual panel.

Now, the problem there, Dr. Dupre, is the problem that certain diseases are known better and certain hazards, to some

THE WITNESS: (cont'd.) people than to others, and one of the problems with...I believe one of the problems with guideline setting as it has gone on in Ontario has been that not only has it been the same group, by and large, formulating the guidelines, but the guidelines apply to some pretty different types of situations and diseases, and one would suppose specialties and specialists and experts that would be involved would be different, depending upon what the situation is.

So I think I would opt for equivocation - come down hard on the side of equivocation, on both sides, and say I could see both.

DR. DUPRE: I very much appreciate that advice. Thank you, Mr. McCombie.

MR. McCOMBIE: Q. Just to hopefully wrap up this segment, maybe it's somewhat simplistic but it seems to me that we are saying on the one hand you have a fairly wide open, raucous political battle as to setting guidelines, which would be done through statutory changes, and on the other hand we have perhaps almost the exact opposite currently in existence in Ontario, where it's a fairly closed and selective group, and you are, I gather, trying to get it more in the middle, although not going to the extent of having the kind of legislative battles over these things.

Would you therefore...I mean I guess what disturbs me somewhat is that you indicate that to do it through either legislation or regulation you are implying that there is going to be political, other political factors that may well come into play, quite apart from the scientific or legal implications, and I guess I would ask you, do you not think that that is a possibility under the current system where there are political pressures - they are just not obvious, they are not visible, because up until recently we have been very unaware of how these guidelines are set.

THE WITNESS: A. Well, your question is, is it

A. (cont'd.) a possiblity, and my answer is, hypothetically it is a possibility. But if you ask am I aware of any instance specifically where I have observed this, I have to say I have been unable to get into the process enough to find out whether there was that. That's not to avoid answering the question. I don't know, and I'm reluctant to say that I suspect there was none, because I don't have any good basis for forming that suspicion other than I haven't seen anything of that sort.

But on the other hand, as I say, I haven't got into it enough, close enough to it, and I don't really know how I could have.

Q. Okay. Well, without getting into whether there have or have not been political considerations in the setting of the guideline, I think my point is that the possibility exists in either pole to have political pressures other than the merits of a particular disease being included, and the amount of time. The potential exists in either system for that to come into play, and I guess the point is that if it's done in the open at least we can see that and deal with it in some way, and I gather that that's why you are recommending at least some opening up of the process.

A. Well, I don't want to go that far as to suggest that if it were done in a legislative forum, and that it be fully politicized, that it would necessarily be open, because I can cite you instances where decisions of this sort have been very political, but certainly very difficult to sort out, all right - where they have not been done very openly.

Here again I apologize, I'm a little bit embarrassed by this. It's much easier for me to cite this based on American experience than Ontario experience, but certainly there are plenty of instances in the U.S. that I can point to where these

A. (cont'd.) things have been fought out in the legislative arena, but not in an open forum, and what we are left with then is a decision, a product, and studying legislative histories and the like doesn't shed a whole lot of light on how some of these things developed - what deals were cut. All right?

Q. Okay.

I guess just one other brief area I would like to ask you about, and it is mentioned to some extent in your report, and that's the area of the benefit of doubt.

Now first of all, can I ask you did you interview members of the ACOCD in preparing your report?

A. I talked to one member.

Q. To one member?

A. Yes.

Q. I guess what I'm trying to get at is, we have heard testimony here that the benefit-of-the-doubt principle that the Board has developed and says should be applied to all decision making levels, we have asked members of the ACOCD and they are not aware of that policy or they don't use it, and we have heard how the ACOCD will arrive at a consensus decision, send it off to the Board as the decision of the ACOCD, and if there is, for example, a minority decision that does not go along to be considered, and I am wondering if you delved into the benefit-of-doubt area at all, with the Board or with the ACOCD?

A. Well, specifically I think I would have to say that I didn't explicitly seek out information or facts on this. As one, I hope, can appreciate, it would be difficult to find that explicitly in, say, going through files, but I'm certainly willing to suggest that I have formed an impression on that matter with respect to the practices of the WCB. I have.

Q. Mmm-hmm. But were you aware of the...well, I guess what I'm trying to get at is the ACOCD in their role as

Q. (cont'd.) consultative committee to the Board, their use of Board policies, in particular the one of benefit of doubt I am talking about now. There are in fact other policies that they may or may not be aware of, and I'm just wondering if you saw the ACOCD as being aware of Board policies on things other than the strict questions that they were dealing with.

A. My impression is that they are not, that they are not only at arms length from the Board and the medical services division, as probably quite appropriate in some respects, but that they really are not attuned to some of the practices and policies of the Board itself.

Let me give you a definite example of that. I think if tomorrow, by dint of some magic, you were appointed to serve on the ACOCD, my understanding...

Q. I think it would be quite magical.

A. ...it's hypothetical...my impression is that you would attend and at your first meeting you would probably look at some x-rays, describe the examination that you might have provided to a worker, and on the basis of that a letter would be prepared. If you were the principal physician examining the patient, you would prepare the letter, and that would be it - which is to say you would not have received a packet of materials, you would not have received workbooks that might lay out for you not the medical side, all right, but some of the Board practices and procedures - perhaps on the grounds that this is of little interest to you, you have other things to do, you are being asked to look at strictly medical questions.

In fairness to the Board - certainly I want to make sure I am on this - my understanding is that if you were to be appointed, Mr. McCombie, or I were to be appointed to that position, one of the things they would like to do is to have you attend some of the meetings of the ACOCD for several weeks or months prior to

A. (cont'd.) actually being put on there, so you wouldn't have to vote at your first meeting, if that were possible.

But the point I'm getting at is that there isn't a whole lot of effort, as I understand it, that's made to communicate to you as a member of the ACOCD what the general practice is, and policies of the Board are.

So that on this matter of benefit of doubt or other issues, I am not surprised that one of the members said he was unaware that this was a Board practice, although I confess I did not ask that of the individual that I interviewed.

DR. MUSTARD: Mr. McCombie, can I ask a benefit-of-doubt question?

MR. McCOMBIE: Certainly.

DR. MUSTARD: It's the question, and you touch upon this in your panels for appeals, etc., that one of the things that has come out very clearly in the testimony is the question of the experts and benefit of doubt. I just would appreciate your views on this subject, from your broad experience.

Let me give you my understanding of what I think happens in the Ontario scene. If I am a member of the work force and I come down with asbestosis, and I have my family physician in my community and I am unhappy with the decision the Board has made about me and I decide to make an appeal, when a family physician decides to be the medical expert helping me to make that appeal, his or her opinion will not count for very much in the benefit-of-doubt question because a family physician, not being an expert in chest diseases, etc., would not be given the weighting that the Board's authorities are, and therefore the appeal will not be accepted.

However, if I know all this and let me suppose it's a case of cancer and I'm smart enough to go down to one of the authorities that exists, say in Ottawa at the mesothelioma

DR. MUSTARD: (cont'd.) registry, and have that person come in on my case and he gives a different opinion than what the Board did, then that will have equal weighting and the benefit of doubt will go to the member of the work force.

The dilemma I face is that from the practical application of this in the sense of equity in the system, a worker is going to have trouble knowing what experts are in the business. Family physicians also are going to be troubled a little bit about the dilemma that they know a great deal about the worker and what has happened to them, and even though they may not be an expert in chest disease, they may have a very sophisticated perception of the problems that person has gone through.

How do you balance this problem of the benefit of the doubt and the experts, and you've got the problem of the local physician who knows all about the worker, who in a sense has an expertise which is unique about the person, versus the medical dilemma that one does have an expert counter an expert, to give the benefit of the doubt?

THE WITNESS: I'm...that's a very, very difficult question, as you understand, for me to come to grips with.

One possibility that exists in Canada, but not in Ontario, is the following: as you know there is a question to, in the use of medical review panels, as to who has access to these panels, and a common screen is to have at least one physician sign an affidavit or a letter or a note saying that in his or her opinion there are grounds, there are medical grounds for reviewing the decision that has been made within that level or whatever level, has been made within the agency, the commission or the board.

Now, when that individual goes to the medical review panel, literally goes for an examination and whatever, and

THE WITNESS: (cont'd.) there can be a hearing, the individual's own physician can come forward and actually testify. He can accompany the worker and make certain that his unique and special understanding of the injured worker or sick worker's condition can be made known to this medical panel.

Now, that is something that wouldn't happen in Ontario because the worker's own physician, family physician as you put it, doesn't have access to the ACOCD. It's not one doctor meeting and talking to five others and explaining why his insight..albeit it not as a chest specialist, but his insight really should be taken into consideration.

Obviously the physician has the opportunity to augment the file with a letter, but there is no appearance, no personal appearance.

Now, that could be done. It could be done here. It is done with medical review panels, it can be done with medical review panels, so that I'm afraid a lame answer to your question is that there are ways that that concern can be dealt with partially, but there is a much bigger question of professionalism, peers, what individuals who have status within a discipline, what weight they carry within decision making bodies - even a body of, say, four other physicians...five physicians get together and one is understood to be a distinguished...you can use the word...specialist in, expert in, noted authority in, has university chair in...that individual is going to carry a hell of a lot of weight whether there are three other members of the panel who are physicians, or fifteen others. If he or she speaks with the weight of that authority, there is a fair chance that they will regularly carry the day and the family physician, or any physician for that matter, will be less influential.

But I think that likely an inadequate answer to

THE WITNESS: (cont'd.) your question is that there are ways that the family physician, certainly, or personal physician, can come forward in some circumstances and make a personal appearance, but I'm not aware of that being done - certainly not in the routine asbestosis cases involving just the ACOCD.

In the appellant process, there is nothing that would prevent that happening. If it goes before the Board, it could happen. But as you know, those instance, to begin with, are very, very rare. We are not talking about the run-of-the-mill asbestotic. We are talking about one case out of very many that winds up getting that far.

DR. MUSTARD: Is it wise, in a situation where there has to be a benefit-of-the-doubt judgement made, to leave the decision about whether there is a doubt in the hands of the professionals who have their own heirarchy and may exclude an argument because you do not have certain credentials?

In other words, should the group that hears the medical opinions as to whether there is a doubt not be some body that is less steeped in the professional attitudes of, say, the profession that's under review, but more neutral in listening to the views that are expressed by the two groups?

THE WITNESS: There are two answers to that, a de facto and a de jure answer. The de facto answer is, and I'm comfortable with leaving it with the medical group so long as the medical group at least is aware of the practices, policies, procedures that the Board uses - including the policy of benefit of the doubt.

De jure, of course, the decision is not made by the ACOCD, nor is it made by the medical services division, so that if one looks at the structure of the Ontario statute and its application by this Board, the decisions are currently not

THE WITNESS: (cont'd.) being made by them, but we all understand that de facto they are.

DR. MUSTARD: And that comes back to the horizontal equity question. If you have the background and knowledge and experience, then obviously you can move the resources to make use of the system to get a fair review of the problem, but if you exist in a community and come down with this and only have your local community to guide you, just the average knowledge of the average citizen, you wouldn't have the sophistication as to how to go through the Board review process, so that I guess I'm really coming down to that there is a benefit of the doubt question and horizontal equity would seem to me require some kind of approach that makes it easy for the average person who is going to be exposed to a health effect problem to be able to get into it, to get a fair hearing.

THE WITNESS: Yes, but that neglects, Dr. Mustard, the fact that a sizable proportion of the labour force of Ontario... if somebody challenges me on how sizable it is, I will hazard a guess...but a sizable proportion of the labour force of Ontario is organized, and as members of the labour movement, labour organizations, the hope is, my hope is that they aren't left entirely to their own devices in the circumstances as you describe them.

That's number one. Now, admittedly probably fifty percent or more of the labour force is not organized in Ontario - probably over fifty percent - what, fifty-five, fifty-eight, sixty percent?

MISS JOLLEY: There's only about thirty percent organized.

THE WITNESS: I thought it was closer to forty.

Sixty or seventy percent are not organized, but the question then you might ask is...and for which I don't have a

THE WITNESS: (cont'd.) splendid answer...why don't they then turn...if they don't have that, well, obviously they can turn to political authorities, their political representatives, and ask for some support there...occasionally that is forthcoming... or the worker advisors which are provided by this agency and by this scheme to serve that purpose.

If they didn't exist, I think it likely that this Commission would invent them, because they deserve to be invented.

So it is not as though they are entirely on their own, although in practice many of them seem to be that way.

I didn't mean to be presumptuous and suggest that...

DR. MUSTARD: Oh, no. I think you have answered the dilemma and that's a dilemma we have to face. I just really wanted to comment.

When you are dealing with a latency question in terms of exposure to hazardous substances, and changeof workplace, change of membership, retirement from the workplace, there are a whole series of questions that come up that make the horizontal equity question, I think, a very difficult one to sort of work out in this kind of a system.

MR. McCOMBIE: Thank you. I have no further questions.

DR. DUPRE: I wonder if this is an appropriate moment to give our witness a brief break, and shall we return in ten minutes?

THE INQUIRY RECESSED

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THE INQUIRY RESUMED

DR. DUPRE: Well, may we resume? Mr. Starkman, your turn?

CROSS-EXAMINATION BY MR. STARKMAN

Q. Professor Barth, in the Workmens' Compensation Act in Ontario, there are certain sections which I read as being concerned with the deterrent functions of the Board, if I can put it that way - steps that the Board can take not only, not dealing with the question of compensating injured workers, but things that they might do to prevent other workers from being injured in the future.

Now, I didn't notice much mention of that in your report and I was wondering if there was any reason why you didn't deal with that aspect of the Workmens' Compensation Board's function in Ontario.

A. I think, Mr. Starkman, the answer is a simple, a very simple one, and that was when we originally discussed what the boundries of the study should be, that was not included. I'm reluctant to say that either it was wise or an oversight, but in the discussions we had as to what the report should contain, this simply never...if memory serves me correctly...never came up as a subject for me to inquire into.

Q. I would like to go into the area a little bit and draw, perhaps, on some of your experience in this area.

I guess the place to begin is, do you see that as being a legitimate function of a board such as the Compensation Board, to be concerned with the question of compensation and the question of, if I can put it, deterrence?

A. No question about it. Nothing ambiguous about it. In the report of that national commission, which I certainly endorsed wholly, one of the five major goals or principals of a compensation agency should be either to encourage safety...but I mean more than just the encouragement...to pursue practices consistent with enhancing the safety and health of the workplace.

A. (cont'd.) In the presence of absence of an occupational safety and health agency, there are things that a board can do to make the workplace more or less safe.

Q. Can you outline some of those, what you see as the instruments by which they would accomplish that goal, making or providing for a safe workplace?

A. Well, there are a number of them. One of them is a very sensitive and very tricky area and I didn't look into it here in Ontario, but it is the whole question of worker removal programs or worker relocation programs or rehabilitation programs, if you want, the concern of continuing to expose workers who manifest some degree of incipient disease or disorder and who continue to face exposure in a given occupation or industrial setting. That's number one.

Maybe that's not most important, but it's one that came first to mind.

The second is the almost as tricky area of experience rating - that is, how one assesses liability and how much liability there is for an individual employer or industry based upon the record of that employer, that industry, the past record of that employer, the experience rating factor.

What other things can the board do? Oh, here's a very important one - I think it's a very important one, maybe others would disagree as to its importance - but one of the things that a board has that other agencies in state, provincial and national governments often don't, is that it can be an early warning signal of industries, firms, occupations where new diseases or new health problems become evident, all right?

Obviously, if they are all located within the same community and it's a small enough community, then maybe the medical profession in that community can say, how come we have six cases of angiosarcoma all coming in this little town when there is no record

A. (cont'd.) of any incidence of this nationally, or it's so small that the likelihood is zero out of one hundred thousand people contracting it.

But if you have either a large community, a big city, or where the production process is somewhat scattered, you might not have that kind of communication. But certainly within a workers' compensation board you have access to information, if workers are bringing those claims in.

So the board, it seems to me, takes on a responsibility there. Whether it chooses to or not is a different matter, but it has a responsibility of providing alerts - alerts to health agencies, to physicians, to workers, to employers, that suddenly we are finding this problem that no one else has reported, and it makes sense that we alert you to this because maybe we can stop it, maybe we can check it, maybe there is something we can learn that will prevent this from exploding.

So it seems to me that's a third area in which a WCB could play a very important function in terms of reducing injuries and, in this case, the incidence of disease.

I'm sorry, I guess I'm tired. I kind of draw the line there, but I'm sure I haven't been exhausted.

Q. All right. Well, with respect to the experience rating, you didn't look into that at all?

A. Very little.

Q. In Ontario?

A. Very little.

I looked at it to this extent - I did not read a report that has subsequently come to my attention, that was prepared by actuaries, that described how the system is in place. But unlike many systems that I am familiar with, my strong impression is that experience rating in this province tends to lean in the direction of...if I use the term 'weak', then it would seem to a value

A. (cont'd.) judgement. I don't mean that.

There is not a terribly high correspondence between the costs that are incurred from a given firm and the premiums or the taxes or the costs that are levied on that individual firm itself, as there can be in other experience-rated systems where there is a very close correspondence - a one-to-one correspondence in the extreme case. For every dollar that is paid out to an employee or to a physician treating the employee, associated with the case, from that firm, the firm bears all the costs of that ultimately. One way or the other, it has to pay for it.

My impression is...

DR. DUPRE: Which jurisdiction is that to which you are referring?

THE WITNESS: Where there is that close correspondence?

DR. DUPRE: Yes.

THE WITNESS: Oh, well, actually to think about it, I'm tempted to say every single state in the United States has it in instances (a) where employers self-insure, where they self-insure, (b) where they purchase insurance policies that are of a specific sort that encourage this.

Now, there are names for this. One of them is retrorated policies, where essentially the firm pays an insurance company to administer the system, to administer workers' compensation for the firm, but whenever the insurance company pays out on a claim or pays a hospital bill, six months later, down the road, that firm has to pay for it, all right?

Now, there may be some limit on total liability, that may be a special policy, but in fact it's not at all uncommon and I think I'm on safe ground to say that you could find examples of it in every single one of the states in the U.S., but not necessarily...certainly not with all employers in the U.S.

That's number one. The second point I wanted to

A. (cont'd.) get to is...and I think it's in the report, if not it should be...that I found that the Board seems to be relatively generous, quite willing to say look, this is a difficult area, we are not sure if you really were the employer where this guy developed the problem or had most of his exposure or whatever, and so we'll put the costs not directly on you as we normally would, or that share of the costs, but we will share it with the industry more.

The rather few instances that I found where employers intervened in a compensation claim in Ontario, the rather rare instances, where intevention is not so much to prevent the worker from being compensated, but it was to say we don't think we should bear the normal cost. And in those instances, perhaps someone here from the Board might correct me, but my impression, strong impression is the Board doesn't tend to be tight-fisted to tend to say, damn it, you are going to pay your share of it no matter what. The tendency is to say, we are sympathetic, this is a tough problem - at least in asbestosis...I can't speak about back injuries or otherwise...and we will put that on the industry rather than on you, the individual firm, leaning, then, even further away from a heavy experience-rating practice.

Does that answer your question?

Q. I think it answered it. I would like to go a little further into it, because my problem is that I understand and support the idea of having some sort of horizontal equity dealing with the claims. On the other hand, even if the Board was charging on a one-to-one ratio for the costs of looking after an injured worker and paying the benefits, it seems to me that there is no economic incentive for the employer to have a better work record in the future - even if...I understand what you are saying, is the Board is not, according to what you have seen, going even that far, but even if they were going that far, then does the

Q. (cont'd.) Board have any, in your opinion, should they be involved in this economic incentive business, if you like, of penalizing employers, a positive penalty for a bad work record, or a work record that is worse than others in the same industry, and moreover, a work record that is perhaps unacceptable in the absolute sense?

A. Let me try, if I can...I'm sorry, I didn't mean to cut you off.

Q. No, I'm fine. Go ahead.

A. Let me try to respond to that as fully as I can, because I think that's a terribly important question.

First, there is, I think, an inevitable tradeoff that I hope you are aware of, and that tradeoff is the following sort - economists might prefer a scheme, and many of them have endorsed a scheme or schemes where firms are made more responsible through heavier experience rating or truer experience rating. Economists have a preference for that on grounds of the internalization of cost - kind of a sophisticated argument.

Union people often seem to prefer that as well, and I suspect sometimes on punitive grounds - you know, that son of a gun was reckless and mean spirited and had no regard for the wellbeing of the worker and he ought to pay. It also speaks in the direction of heavier experience rating.

The tradeoff and the problem comes about in this way - the more experience, the more sensitive the experience rating is, the more you will force employers to come in and intervene in the claims process. Not the claims process specifically as to should I be responsible or not, but to fight individual claims and say he shouldn't get compensated.

Now, in Ontario you don't see that very much. At least I don't find it very often. I can cite a couple of exceptions to you and no doubt you can to me of ones that I'm not

A. (cont'd.) aware of...you can cite exceptions, but they are rare, of employers who have made a point of going to the Board and saying, this worker doesn't deserve to be compensated for his alleged asbestos-caused disease, but the instances I know of are rare enough that I can tell you who the employer is and I can cite some of the cases for you. It's very rare.

You start experience rating more toughly, and you are going to find that those are not rare - I would predict, I would suppose. You are gearing the incentives not necessarily to have the workplace safer, but to making it worth the employer's while to intervene as a party, as an adversary, to fight claims.

Now, that's the tradeoff. That, I think, is the inevitable product. So if you want that, if you want to hit the employer and use it on safety grounds or on punitive grounds or on the grounds that it satisfies for a number of other reasons, fine, but be alert to the possibility...and I think there is a very high likelihood...that it's going to mean you are going to have more employers intervening.

Now, the experience, by the way, in lots of jurisdictions is that some union people and labour people would say just the opposite - we want less...we want the employer less rated, because that's the incentive that brings the expletive here to fight the claims. We hear it in unemployment insurance as well as in workers' comp, so I think you've got to be aware that there is that kind of tradeoff.

Now, the end of the message or the sermon, if you will is, why bother using that device to improve...oh, I'm sorry, there are two elements to be concerned with...one, why bother using that device to insure that there is no asbestos or the legal amount, only the legal amount of asbestos in the workplace? Why not have occupational safety and health laws that have some teeth to them, and use economic incentives geared to that - fines, I don't care what,

A. (cont'd.) jail sentences if they run a particularly foul establishment? Do that, rather than the indirect method of causing the employer to fight claims by going through experience rating.

That's...I'm sorry.

Q. Yeah, I just wanted to just respond to that point or perhaps carry it a little further. That's an area, if it is true, if it would be true, it's particularly terrifying to me because what it suggests is that the decision-making process would be influenced by the intervention of the employer, so there must be something really wrong with how the decisions are made about someone's medical disability if the intervention of the employer could somehow fundamentally affect that decision-making process, and the second is, that if employers are not intervening, the converse to tight experience rating systems would bring about a large intervention by employers, the converse is that if they're not intervening on questions of entitlement, then that system must be so loose that it suits their purposes to just continue to pay the ratings that they are paying, and essentially through this process buy a very inexpensive insurance policy.

That's...I mean, that's what I find disturbing about that, sir. I'm not saying it's wrong. I think you are probably right. But I'm just asking if that is right, what does that really say about the system that we have for this type of compensating injured workers?

A. I'm only willing to conclude that there are not strong financial incentives now on employers to fight claims, and to have staffs of people - the large-enough firms - whose full-time job it is to go before the Board and accumulate evidence and get their own physicians, to make their own supplementary reports and so on, and if you are offended by the fact that that kind of environment could conceivably influence the Board's

A. (cont'd.) decisions, then I will simply voice my surprise at the extent to which you can be offended, or the ease with which you can take offence.

I think it will happen. I think it's an inevitable product of that, but why not do it directly and say, look, this is the standard for the level of asbestos that's going to be in the air, and if you violate that we can provide economic disincentives to you, we can close you down, we can jail you or do something, whatever, to your managing directors or to your supervisors, whatever, if that's the problem. Why do it indirectly?

Q. I'm just exploring that through the WCB, the workmens' compensation process, because we have heard evidence from the government as to how they do enforce these regulations and my perceptions is that those economic disincentives just haven't been there either because of the proof problem, lack of will or insufficient penalties.

A. Can I tack on one quick answer, too, that I haven't yet made? That is, what really distinguishes asbestos and a few of the other environmental hazards, in this argument, from defective ladders, from grease spots on the floor, from wires that are left irresponsibly unsheathed or whatever, is that just about all of the asbestos-caused diseases develop only after a number of years.

Now, if you are saying that...let's put in a system today that's going to have some teeth to it, under workers' compensation, and really sock it to these people economically when claims come in, the fact of the matter is if Starkman and Barth open an asbestos insulation shop tomorrow and run an irresponsibly dirty shop, the claims aren't going to materialize against us for a number of years, and the most serious claims not for decades.

That provides me, frankly, especially in a world

A. (cont'd.) of high interest rates, with no economic incentive whatsoever to maintain a clean environment.

If you depend upon workers' comp to have that clean environment, in the case of hazards associated with long-latent diseases, then you are not only betting on the wrong horse, you made a grievous mistake in terms of the future wellbeing of those workers, and if I'm too brief on that I would be willing to expand, but I suspect it will be...

Q. What about the possibility...my understanding is it works in the United States...that somebody could have a tort claim, a third party litigation of products liability cause of action against their employer. It is my perception that that type of action is a substantial economic incentive to the employer to improve, to have matters improve, because of the size of the awards, at least in the United States in asbestos litigation the size of the awards is quite astounding - especially the amount of punitive damage awards, which are not covered by their insurance policies.

Do you see that type of scheme being feasible, to couple it with a workers' compensation scheme?

A. Well, that's really a two-part question. If the question is asked in terms of the issue of safety, is that really the way to encourage more safe, healthful practices, I feel fairly confident that the answer is no.

There was a contradiction in terms which you used, Mr. Starkman, and I'm reluctant to point that out, but you don't have third party actions against your own employer.

Q. Yes.

A. That's an important point to the extent that with a recent exception that emerged in California, just to take the...well, approximately half of the asbestosis and mesothelioma claims in this province came from one employer.

A. (cont'd.) Now, with the exception of that decision that came in California fairly recently, that own firm's employees are precluded, under the law, from suing that employer. So the only people that had access to sue that particular employer were employees of some other employer.

If you would tragically extrapolate from the U.S., our experience, that experience to here, what you find is that with half the claims coming from one employer you would be precluding half of your claimants from any acts as tort...if you would do it as we have, in terms of third party product liability.

Q. But they could sue a related employer. In other words, if you take the Johns-Manville Corporations...

A. And they would lose, and they would likely lose. They would likely lose. In the States, the group to sue are Johns-Manville and other manufacturers, distributors of asbestos, all right? And half the people in this province who have successfully sought compensation have been employees of the Johns-Manville Corporatio - for asbestosis and mesothelioma, and except with that peculiar decision in California, if you applied U.S. laws and practices they could not sue. They would be precluded from suing Johns-Manville.

I don't know who they would sue. That one peculiar case, which may set a precedent, was against Johns-Manville...a successful suit by a Manville employee against Manville, but it's rare...rare enough that we can cite it and say it just happened and who knows what that means for the future.

Q. Well, I don't really want to get into the legal question of who you would sue. I guess you could try to sue the asbestos mines for providing the material, which was then used by the employer. I guess...

A. But you have to demonstrate negligence, remember?

A. (cont'd.) You see, the problem..you are saying you don't have to demonstrate negligence. Well, the thing that... asbestos is different than coal. Coal workers in this country... sorry, in the U.S., aren't suing anyone. There is no one they can sue. Workers who have been made very sick from lead aren't suing anyone, nor people with berylliosis, radiation sickness, and I can run down the list, and then we would run late.

Q. But should they have the option of this suit?

A. That's the other question.

Q. If that's the case, as you are describing, shouldn't...what would you think or could I have your opinion on a scheme whereby they get workers' compensation, they have the option of bringing their civil action against their employer, and if they recover, then they have to, of course, repay any monies they might have gotten from a workers' compensation board?

A. You are asking for a value judgement, which I would be happy to share with you, but you have to understand it is a product of a lot of values.

The English, of course, do have a system of workers' compensation that does permit tort actions. That is, they are... you can use either or both remedies if it turns out they are available to you - that is, if you have a claim. So it's not as though there is absolutely no experience. There is a country where there is such a practice.

I spent a very small amount of time there. If this Commission would encourage me to return, perhaps I might find some time in my very active schedule to do that, but I spent a very short time there, a brief time there, to be serious.

I want to point out two things to you. One, whether it be Britain or anywhere else...I'm not an attorney and I have an aversion to a remedy that I think tends to be very costly, costly in the sense that the injured party often doesn't get a whole

A. (cont'd.) lot of those resources flowing into their own hands. I have an aversion to that. I mean, my training and my instincts are to have an aversion to a system that has very high frictional costs where the injured party doesn't see much, that's number one. I think they are inefficient.

And certainly in the case of asbestos, going back to the U.S., the decisions seem to me in many instances to be capricious, to be luck - what attorney did you draw, how did he arrange a settlement for you, whose interest was paramount in arriving at that settlement, and so on. So I have a concern about that.

Number two, more importantly - hopefully less visceral and more factual - what you have to understand is...what I think you have to understand, what I think is a fact is, that in a world in which workers have access both to workers' compensation and to a tort remedy, my prediction would be that a legislature or a parliament would tend to reduce the level of benefits under workers' compensation, explicitly or implicitly supposing that look, this guy has got access to two remedies, so we are not going to make this guy a rich person, we are not going to make her a wealthy widow of this process - she can get plenty under the law suit, so we don't have to make workers' comp quite so rich...which of course may make some sense except for those persons who, by dint of the nature of the their injury, have no access to the tort system.

In England, for a scheme that purports to be very liberal, that is very sensitive to needs...seems to be very sensitive to needs of workers and the like, benefit levels under workers' compensation are about the stingiest I know in western Europe. That may have changed since 1976, when I was there, but my understanding is and was that the mind set of people who vote on these things - members of parliament - is look, you've got

A. (cont'd.) two levels of benefits, you've got two types of benefits, why be so rich on both.

I've seen other cases, by the way, in analogous circumstances, but not where the tort remedy was the second benefit. I don't think that's...I think that's a likely outcome of allowing two systems to do it.

DR. DUPRE: Dr. Mustard?

DR. MUSTARD: Can I pose a few more questions in this area?

As it really addresses, tries to get at this question of the dilemma between exposure to something in the workplace that has a latency period, and then you develop the problem that's going to shorten your life, and the problems of companies' turnovers and how you put any kind of financial pressure in the system, and we learned in the testimony about asbestos, the way the Workmens' Compensation Board operates...I think I've got this right...that since Johns-Manville has closed its asbestos pipe plant - I believe it was in class one thirty-seven or something in that category, and is not longer operating in that - so Johns-Manville no longer pays anything for any claims that come up because it's not longer operating a division within one thirty-seven, and that's shared amongst the rest of the firms that are still in that class.

So in a sense if you are arguing for financial incentive for Johns-Manville, which still exists as a corporation though it really no longer operates within our framework, in a sense maybe that doesn't exist anyhow in any kind of compensation kind of process, but on the other kind of the coin one does pick up...and this is not evidence, this is, I suppose, ad hoc information...but corporations which are working with chemicals and are concerned about the future and the fact that tort liability does exist within the framework it does in the United States,

DR. MUSTARD: (cont'd.) are extremely sensitive to putting onto the market, either for someone to use or manufacturing, anything which is a potential carcinogen, and indeed they are going to great pains to try to maintain some degree of prescreening of their products, and one gets the impression that part of the incentive for that is the risk of tort liability. So it's not in the compensation section, but it's an incentive to make sure your act is clean.

I wondered if you had given any thought to what might be a suitable financial incentive program or economic incentive program for corporations to take up a very positive approach to the sensitive question of minimizing exposure of the work force and the population, recognizing that historically, prior to 1970, our knowledge base was not such that one would sort of be able to do it because we didn't really have the appreciation which we now have. But having gone through all of this, and seen all the tremendous problems we have with the existing systems, is there any kind of economic incentive plant that could be put in to ensure that the corporate side of the world is under strong incentives to give very high priority to minimizing risks?

THE WITNESS: Yes. Well, I think there is, in this respect, that there are very direct methods, in the abstract at least, that can be used, and those can involve the fines, they can involve the threat of a shutdown, they can involve the assumption of the assets of that corporation in a world in which that corporation flagrantly violates...or forget the word flagrantly - substantially or continues to violate health and safety practices as set down by some agency.

Now, the world as you described it may be the best of all worlds, where you don't incur all of the unpleasantness and headaches and costs of lawsuits, but watch the Americans do it, and base your behaviour on that.

A. (cont'd.) On the other hand, I'm not sure that the behaviour is entirely salutary or ideal, because you are dealing with a lot of uncertainties. What may be thought of as a safe product today may indeed turn out to be made with ingredients that tomorrow become the source of, understood to be the source of damaging one's health.

All of that uncertainty means that...well, there are lots of problems associated with that uncertainty, including is it really fair to sue an employer tomorrow for using a product today that we think of, what was widely thought of as safe.

On the other hand, the individual worker or the survivor or the family of that worker ought not to bear the burden of that either. I'm not suggesting that they should bear the economic burden. It seems to me there are ways to do some of both, but if you are persuaded that the way to get employers to really clean up their act is to use economic incentives - and certainly professionally I could hardly argue otherwise - then I say why not do it directly. Why not just do it directly?

DR. UFFEN: Could I ask a question here? Have you any advice to us, though, about what to do about a situation with latency in the background, where the employer moves out of the jurisdiction, leaving the cost for the rest of the industry that doesn't move out and the other costs to the employees who can't move out?

THE WITNESS: Well, there is one answer that I think most of you would find unacceptable...I don't know, but my guess is you would...and that would be to move from a provincial system to a national system, because in a national system movement obviously could go on interprovincially and employers would not be able to run away or escape the costs that they are responsible for, so that one argument would be to do that, and in fact my own feeling is with a casual understanding,

THE WITNESS: (cont'd.) a very casual understanding, that not many people are seriously speaking of moving toward a federalized system here in this country.

Aside from that, I don't know the answer except to suggest that there are ways in which employers perhaps could be required to post bonds, and that it be understood that those bonds be used...that that bonding arrangement be used to help defer costs that that employer may incur in the future - present or absent.

Absent doesn't necessarily mean they move on to B.C. or Quebec, it could be that they go out of business, they go bankrupt, the proprietor dies and the business closes because they are not there.

So arrangements could be made where...I say arrangements...one could envision a situation where that might be put into place, but I'm not aware of any with your kind of scheme. In a system of insurance as we have in the States, self-insured employers are required to post bonds in order to make certain that if they go out of business the costs that are theirs are to be maintained - at least for some future time.

Secondly, the bulk of American employers purchase insurance through private carriers, and the question is, what do you do if the employer goes out of business and no longer has a carrier, or if the insurance company goes out of business, and in our systems the normal situation is - it's not entirely true, but the normal situation is that those firms that have the privilege, with quotes, of writing workers' compensation insurance in a state are obligated to pick up the claims that would fall upon a now-bankrupt insurer...that has disappeared from the scene.

DR. UFFEN: You have dealt with two very interesting possibilities - the firm that closes down for whatever reason, the firm that moves from one province to another. What about the

DR. UFFEN: (cont'd.) international situation? We have been talking quite a bit about the American situation...

THE WITNESS: I apologize for that.

DR. UFFEN: ..and the Ontario...no, that's quite all right. There is quite a bit to learn. In fact, it may be very pertinent to our investigation that one of the situations is that the parent owner is an American firm with headquarters in Denver.

Have you any advice to give us about that particular situation?

THE WITNESS: I confess that I would like to think about that and perhaps prepare a response to it perhaps later today, but I don't feel very comfortable at this minute doing that because it would be very much off the top of my head.

There may be...I have to think there are analogous problems that our legal friends have encountered in other areas or in parallel areas that perhaps might give us some guidance, but I can't...maybe it's the hour, maybe it's me...but I can't think of anything right off the top of my head.

DR. UFFEN: I don't suppose it's very easy, but we have had testimony fairly recently where it would appear that the policy decisions were being made outside the country, and even the inspectors, the public health employees, felt that they were directed and responsible to the parent organization, not to the Canadian corporation, and this makes the question of incentives or disincentives a very complicated one, so I respect your request to think about it.

THE WITNESS: There are, of course, analogies where you have a decentralized system and the employer is operating a main office in a different province. In a sense, the future of a Manitoba firm with a branch in Ontario may give you exactly the same kind of problems - no access to where the decisions are

THE WITNESS: (cont'd.) made, and no tools or no clubs or no penalties can be readily imposed by this province against that head office that is absolutely prepared to close down in London or Toronto or wherever it may be. But I would like to mull that over, and perhaps have John give me some wisdom on that later.

DR. DUPRE: Mr. Starkman could...

THE WITNESS: Mr. Starkman.

DR. DUPRE: ...could I just go back to the mainline point that he raised to your well-taken advice that reliance on the occupational health regulatory regime is the best thing to do. In other words, use fines, shutdowns, etc., as your principal incentives for maintaining a healthy workplace.

Without quarrelling with the general proposition you advance, the problem is that an occupational health regulatory regime will basically only provide you, in most cases, with a healthy environment once you have some knowledge of what it is what kind of hazard you are trying to reduce - be it the hazard of an accident or the hazard of a particular disease.

At this point, a very important linkage - which is that in many ways you cannot trigger the operation of your occupational health regulatory regime until you have someway or other identified what it is that you are trying to regulate.

Now, at this point, of course, you can say, yes, the public sector itself can do a great deal more in terms of trying systematically to identify potential hazards, and we've got a study of our own on that. You do face though, I think, a situation there, in any of a number of instances that the knowledge or the potential knowledge of what is a hazardous substance is going to be found in a firm itself. It may even someway or other be linked to that envelope term of industrial secret, and at this juncture one can perhaps think of tort liability, perhaps as an incentive that might lead employers that much more to disclose the fact that they may be

DR. DUPRE: (cont'd.) using in a particular process a substance that might be hazardous?

THE WITNESS: Or it might cause them to do precisely the opposite.

DR. DUPRE: Could you expand on that?

THE WITNESS: If I were an employer who detected a disproportionate number - which might be two or three or four cases - that I was very concerned about, suspicious of as being a likely product of working in my workplace, what you are telling me is I have a profound incentive to try to hide that, disguise it, to prevent word from getting out, and keeping workers from sharing that information with each other, and getting doctors not to report that. By the way, that is, of course, something we haven't talked about - the possibility that a legal requirement be imposed on the medical community, as exists in some jurisdictions, that they must report to the workers' compensation authority instances of what they believe to be industrial injuries or illnesses. California has such a program.

But what you are telling me is that fear of tort is going to cause me to cover it up, to keep it from getting out, as opposed to doing what some employers in the province are now doing. Now, there may be plentythat are covering up, I don't know, but I can tell you one instance and I suspect some of you are aware of it, at least one instance where...and there are plenty where the employer was the one that initiated the claim...but there is one instance where the employer wrote the WCB and said, Holy Cow, I don't know what's going here but we need some help because we think we have three cases of mesothelioma come out of this establishment and we don't know what to make of it, but we need help.

It's one of your large...one of the largest multinationals operating here in the province.

I wonder if they would have done that in a world in

THE WITNESS: (cont'd.) which they could have been held up to tort action.

DR. DUPRE: I take your point, but let me perhaps try to design it just a shade more specifically. Supposing we posit a situation where you have a no-fault workers' compensation regime. However, the sole ground for a civil suit against an employer might lie in the failure of that employer to have disclosed in the past, at the time that he got some knowledge that the substance might be hazardous, the information that that substance might indeed be hazardous.

Now designed in that sense, is there possibility of an incentive here, of an additional incentive to disclose?

THE WITNESS: Well, one certainly could visualize a situation where that could be done and create that incentive.

Again, I think it creates with it the possibility of a disincentive.

There are, and certainly asbestos has unearthed this, there are issues like what is it reasonable for a responsible employer to have done who has learned that this was a hazard, and that then becomes the focal point or the controversy or the litigation.

There was an obscure master's thesis prepared in Taiwan that indicated there might be a link between that substance and deaths...or animal studies don't make it quite so obscure, although certainly there is plenty of good scientific work being done in other countries.

What worries me, Mr. Chairman, what worries me is...

DR. DUPRE: That that kind of suit could be endless, costly...

THE WITNESS: That that kind of suit isn't really settled on the issues - on the issues that you would like it to be settled on, that we could agree it ought to be settled on, but

THE WITNESS: (cont'd.) that it's settled for the wrong reasons, dealt with in the wrong way.

DR. DUPRE: Not least because, perhaps, it relies in the first instance on the capacity of an individual to launch a suit and to sustain it.

THE WITNESS: Very, very definitely. His ability or her ability to identify the right attorney, etc.

DR. DUPRE: Well, okay.

Now, that being the case, let me run the following up your flagpole, if Mr. Starkman will give me one last crack at this one. Suppose you had a situation where you have a no-fault workers' compensation system. However, the right that any individual might have to get into a civil liability suit would be vested in the compensation agency, or for that matter, in our system, in a minister, and such that a person could take civil action against an employer - again, solely on the grounds that that employer had failed to disclose the hazardous nature of a substance at the time when he first got that knowledge.

THE WITNESS: That's a little more attractive, but we can make that process much more direct again and I think...here I'm on very shaky ground as to the nature of the ability of this particular board, given the Statute...but certainly there are precedents where the board can say, look, here is a worker who was injured and we think that the responsibility is whatever...willful, or whatever...and we are levying a triple penalty against you, the employer. The money need not go directly to the injured worker. The worker is dealt with in the compensation arena. But based on what we found in our proceeding, we are going to fine you, we are going to make you pay three times this and you can help finance our new computer system or whatever, but you are responsible.

Why involve a civil action? Why not...that is, how much faith do you have in the WCB to not...that is, do this too often

THE WITNESS: (cont'd.) to satisfy you - given the power to do it when they...on the basis of the decision that they reach in an individual case.

DR. DUPRE: Possibly only because, of course, in the accident situation you can relate it to the case of that individual. In an industrial disease situation, perhaps what a jurisdiction with the kind of scheme that I have in mind is doing is flagging to an employer who introduces a new substance into the workplace - look, you know, we've got a regulatory regime and you've got all that kind of stuff, but just in case, you know, you want to think through again, making sure that we know about your industrial hazards, you know, here in this jurisdiction, by crackey, you know, we've got a possibility that twenty or thirty years from now the attorney-general might come marching down your throat with one hell of a long and costly liability suit that could have involved a whole bushel-load of possible claims down the line.

I'm just wondering if that doesn't alter, just subtley again...

THE WITNESS: Two things, with all due respect.

DR. DUPRE: ...alter the...

THE WITNESS: The concern that brings us here today is one that doesn't surprise us now or in the future, and that is... that's not the future problems...we have asbestos, we have a disease now, we'll have in the future two sets, say, but it's not a problem of the new substance, the new method, new process that gives arise to disease twenty years ago. That happens

DR. DUPRE: That is correct.

THE WITNESS: So in one sense...I'm not suggesting that you drop your line of questioning...I'm just saying that the way is easier for you because asbestos, to my way of thinking, doesn't let me forget.

But the other is that you might...

DR. DUPRE: That is correct.

THE WITNESS: ...you might want to explore...and I'm embarrassed to say I'm a very poor person to help you to do that today or whatever...but you might want to explore our experience in the U.S., with TOSCA - the Toxic Substance Control Act - because what it sought to do was to use a federal process to deal with the matter of uncertainties that occur precisely because we know there are always new substances, there are new mixtures, there are new methods by which they are being heated, or new temperatures to which they are being submitted, new processes, new substances, new products, and the concern that while we may not think they are harmful today, we don't know, and should any employer or any individual have the right to simply willy-nilly introduce this and then play the Russian roulette of wait and see if the stuff turns out to be dangerous as anything.

So I apologize, I don't know if there is anything like that here, but there has been an effort to cope with it - not through the compensation arena - with our Toxic Substance Control Act. It's four years old now.

DR. DUPRE: With respect to the kite I've just been flying, by the way, Dr. Barth, I fully appreciate, as you do, that this is not a way of coping with the asbestos problem now, given what's known. But the reason why I've flown it is that one of our responsibilities, of course, is to learn from the asbestos experience and to point out such things as perhaps learning from that experience might provide incentives for safer workplaces in the future.

Mr. Starkman, you've been very generous and you undoubtedly should have all the time you need. I'm just wondering if perhaps this is not the time to break until two-fifteen, and then we shall hand it back to you?

MR. STARKMAN: That's fine.

THE INQUIRY RECESSED

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THE INQUIRY RESUMED

DR. DUPRE: May we resume? Mr. Starkman, you are still at bat.

MR. STARKMAN: Thank you, Mr. Chairman.

MR. STARKMAN: Q. Before the lunch break we were talking about the merits of imposing a civil liability upon employers for injuries caused to their employees, and I was wondering...well, in that context you suggest that direct penalties might just serve the same purpose in acting as a deterrent, and I was wondering if you were aware of any of the states having taken an active part in criminally prosecuting employers who find themselves in a situation as the Chairman was identifying - that is, an employer who had, perhaps ought to have had, knowledge of the existence in their workplace of a dangerous substance - and what occurs to me is that at least in our criminal code there are a few sections that would be directly applicable, although rarely, if ever, applied. The first would be criminal negligence causing bodily harm, and criminal negligence causing death, and there's also sections which deal with the question of recklessness, and usually they are applied in a motor vehicle accident type of situation, but to my mind they could equally apply to an employer who might find himself in that particular situation.

Are you aware of any of the American states taking up the question of criminal sanctions in this way?

THE WITNESS: A. The answer is no, I'm not very much aware of it, and I think part of the reason is that since the legislation of 1970, by and large much of that...most of those questions have been moved from the state arena to the federal arena, and so many states don't believe themselves to be in that business

A. (cont'd.) any longer. In fact, the majority of states don't, and so it's not a pertinent question for them, but instead they leave these activities to the federal occupational safety and health administration.

The states and the federal government have been loathe to use criminal remedies. Now, I'm not sure I said this morning that that would be appropriate, but if I didn't, I would certainly say it now, but you can do both. There can be...certainly there can be civil...there can be fines and there can be noncriminal penalties imposed, but I would suggest the answer is that the U.S. has been very slow to proceed in this regard, and the states have been very slow.

Q. I guess...

A. My understanding is, too, by the way, that that's true for much of the world. It's not just the North Americans. It's not uncommon in Europe to avoid using, quote, tough or harsh measures of that sort - even where they have the access to it, it's very rarely employed.

Q. Have you ever had any occasion to inquire into the reasons why that would be, why they would be loathe to use those sanctions even when available?

A. No, I don't really know. I'm really not equipped to answer that.

Q. The...I guess...I borrowed this Act off the desk, but it's section eight of the Act that does deal with third party claims in Ontario, that exist. I wonder if you had any reason to inquire into the Board's interpretation or application of that section?

A. No, I haven't, Mr. Starkman. I confess that I haven't thought about this in a year's time, so I apologize.

Q. That wasn't in your mandate, I guess?

A. Well, I don't think it was, but even so I think

A. (cont'd.) I came across it a year ago, or six or eight months ago, and have really not thought about it since.

Are there any questions, though, other than of specific language here?

Q. Well, I was just...that section, section eight and it has many subsections, but essentially I think it deals with a situation where an employee might have a right of action against someone other than their employer for an accident caused while they...during the course of their employment, and the questions would be how many such elections were made to take the civil cause as opposed to taking their remedy at the Board, etc....whether when the Board has a subrogated interest whether they pick that up and what sort of settlements they in fact get, how vigorously they prosecute those claims. I think you just rounded out the picture, but if you haven't look at them I guess it's not a matter really worth delving into.

A. I think I had better pass on that. I apologize.

Q. I would like to go to the adjudication process. I know you touched on it with Mr. McCombie, but I have some problems. I'm just wondering whether your review of the files might have indicated the answers to some of the questions that remain in my mind.

Now, we understand that the...in an asbestos claim the recommendation often comes from the ACOCD to the adjudicator who has the benefit of the guidelines in terms of making the decision, and has de jure function to make the decision, although their decision is greatly influenced by the recommendations of the doctors and the advisory committee.

A. I think you want to be careful there. The advisory committee very, very largely deals with asbestosis.

Q. Yes.

A. And when you talk about the guidelines, by and

A. (cont'd.) large it makes sense to limit that to cancers, mesotheliomas and cancers, as opposed to asbestosis, so that occasionally there is, as I mentioned this morning and in the report, a rare cancer case may get to the ACOCD, but if it involves the ACOCD, by and large you are not talking about a claim that will involve explicitly the use or otherwise of a presumption, because you are dealing principally with asbestosis, all right?

Q. Yes.

A. All right.

Q. Was there any indication that the adjudicators would meet and share their...exchange information as to how the cases were being decided? Did your research indicate they would have discussions or reference to cases that were recently decided?

DR. DUPRE: In cancer claims?

MR. STARKMAN: Q. Well, yes, we could deal with cancer claims.

THE WITNESS: A. You mean the claims adjudicators?

Q. Yes.

A. Well, there is someone in the room who could comment on procedures, formal procedures the Board has. So far as I know, there is nothing that I came across that suggested that there were such discussions or meetings, formal or otherwise.

Q. I guess the issue I would like to deal with is, when you talk about things like publication of Board decisions and the whole issue of whether that would be of benefit or not in the sense of both the adjudicators being aware as to what the other adjudicators, and the claimants being aware, the public being aware, do you have some opinion on whether or not this is a positive benefit, to have published decisions of the Board?

A. I don't have terribly strong views. It's very hard to argue...I think it's very hard to argue against making information available that already exists.

A. (cont'd.) On the other hand, in the cancer cases specifically...I mean, let's try to sort it out. The asbestosis cases, with exceptions, are fundamentally - the decision emerges from the ACOCD, it is their decision - practically speaking it is theirs.

In the cancer cases, the vast majority of them do not go to the ACOCD. Where those decisions are made, the majority of them are made by several members of the medical services division - one or more.

Q. Yes.

A. Those decisions are decisions that usually don't involve any kind of written statement, unless you would consider a written statement like two sentences on a form that is sent back to the claims adjudicator saying 'clearly this falls within the guidelines, let's compensate him', or 'we've checked this out and there is no reason to compensate', or 'this cancer isn't caused by asbestos'.

That, then, essentially is what causes a claim to be denied, subject to the appeals process going up beyond that.

I'm not sure what kind of written decisions one would expect to see from that. Would it be a score card, a tally sheet? Obviously not the same kind of information as you would on a written decision, as at least I envision a written decision.

There is something like a score card that the Board provides periodically- how widely that is disseminated, I cannot tell you, but there are...there is an annual statement by the Board of the number of occupational disease claims...it's very limited, it's very limited, and almost certainly doesn't qualify for what you mean by a written decision.

So are you talking about claims that are denied at the appellant level?

Q. We can get to the appellant level.

A. All right.

Q. Maybe we'll deal with that now.

A. All right.

Q. You mentioned that few claims seem to go to appeal.

A. Very few.

Q. Can you suggest a reason for that?

A. I cannot. I'm not...I mean, one would have to speculate. We are dealing with all of the uncertainties that we did this morning - the question of why aren't people who may have an occupational disease not filing, or taking advantage of their legal right. Why are people who have access...

Q. But they may not know. Those people may not know.

A. That's right.

Q. But these people, if we talk the appellant process, according to the Board's form letters are explicitly that they have the right to appeal when their claim is denied.

A. Yes.

Q. So they assume that they do know of their right to appeal.

A. Of course. I just meant by analogue, we are asking a question why are people not doing what they have a right to do, where the costs of doing this to them...at least the usual economic costs...seem to be very small. They don't have to retain counsel if they don't choose to, they can still press ahead. The amount of time of their own time that would be involved in this kind of thing isn't terribly great.

Are the psychological costs of seeking an appeal so large and intimidating as to prevent them from doing this? It's possible.

Is it that they are so persuaded that they can't either provide additional evidence or that the case, that the decisions have already been made in advance...if they have lost

A. (cont'd.) once, the same agency will deny them again in the future? I don't know.

I don't know what the answer is. All I can tell you is that in light of the way the problem was presented to me initially - namely, there were lots of workers who were very unhappy with workers' compensation in Ontario, lots of complaints, lots of grievances and the like, without questioning that my personal reaction is one of surprise when I found how few of these individuals pursued their legal rights to the end.

Q. Of the ones that do pursue their legal rights, do you think there might be a benefit in the publication of those decisions? At the appellant levels you often get...you usually do get...quite a...you get a longer decision, with reasons and analyses of the evidence and those types of things.

A. Well, if those kinds of decisions are provided regularly, and for reasons that I shudder to think about this kind of requirement wouldn't prevent those from being written in the future, then my reaction to it is yes. I think it would be a splendid idea.

Q. I don't recall in the study any separation between a fixed-site and a nonfixed-site claimant, is that correct? The files you looked at, I assume that they had some...there were claims from nonfixed site employees?

A. Oh, absolutely. Yes.

Q. Did you notice any...

A. Or from multiple fixed-site employees, because...

Q. Yes, obviously. And I don't want to deal with those, not the multiple fixed-site, but the nonfixed site, being demolition workers or constructions workers.

A. Yes.

Q. Was there any noticable difference in the treatment between those files, or were you looking for that type of

Q. (cont'd.) difference?

A. I don't think there was any, except for one possibility that...I'm a little shaky on that...but one is that with essentially multiple employers, the need for the Board to move ahead rapidly...the Board needs, as you know, three forms, or would like three forms with which to proceed. The claim can be started without any forms, can be started almost in casual conversation, but there are the three forms - Six S, Seven S and Eight S - and the problem is that there may be multiple Eight S's that are called for, and in the presence of multiple Eight S's, or multiple employers, there can be some delays in terms of identifying them, but I can't really say this will slow down over the longer range the handling of the claim.

I don't think so. I don't think so.

There are, of course, possible...there are instances where one of those employers will raise a question as to who is the liable employer. That will not affect the claimant. That will create a question for the Board, but it won't affect the claimant or the handling of the claim.

MR. STARKMAN: Those are my questions, Mr. Chairman. Thank you.

DR. DUPRE: Thank you, Mr. Starkman.

Miss Jolley?

CROSS-EXAMINATION BY MISS JOLLEY

Q. I would like to start with the ACOCD, and one of the things that does not appear in your study...you mention the fact that five of the members come from the Ministry of Health or Labour, and they do come from the chest disease surveillance division, or whatever that is called. You don't deal with the fact that they are the same people that are surveying these workers initially, and we have had evidence to indicate - including Dr.

Q. (cont'd.) McCracken's critique of your work - saying that in fact the Board doctors place a good deal of weight on the chest surveillance findings, and I find it a little worrisome in the fact that the same people that are initiating claims are then being reviewed by the...or rather they are being reviewed by the same people that in fact may have stated they didn't have asbestosis, and as a result of their own personal physician they may have gone to the Board and then if they are lucky enough to get by the two physicians - in the sense, that they are then referred to the same physicians that were doing it originally. Do you see that as a problem?

A. Well, I see it as a potential problem, but it may also be an almost inevitable kind of situation where there are relatively few doctors that either are willing or able to do this type of thing.

One of the issues that comes up again and again, and it's very hard for me to comment on it because of my own discipline - or lack of it - is the relative rarity of people who are well-qualified to do this, so you may find some overlap in personalities, in people who are actually wearing two different hats in this process.

I confess the problem had not occurred to me until I saw that in the transcript, and was unaware that that might be the case, namely that Dr. Dyer and Dr. Stewart placed that great weight on the product, say, of individuals coming from the Ministry of Labour, and that they in turn were individuals who appeared on the ACOCD.

That connection had been missed by me, I confess, and I learned it last night.

Q. I would like to explore a little further your conversation with Mr. McCombie about the politics and the guidelines, and one of the senses I have in reading your study and in reading,

Q. (cont'd.) indeed, the Workmen's Compensation Board's submission to the Royal Commission is this sense that it is a rational process of the development of these guidelines, and having been a participant in the quote, rational or irrational process, I wonder why you hadn't pursued the politics around the development of the guidelines.

For example, you do state...and this is a little bit off to the side...that in 1975, the asbestosis claims went up significantly - especially at Johns-Manville - and you don't draw any conclusion as to why that might be.

Did you explore the potential politics around that issue at that time?

A. Not the politics of it. My understanding was that there was some change in the economic environment around J-M at the time, and that the increase in claims was attributable to that condition.

Q. Right.

A. Now, that may or may not be true, but certainly the record across jurisdictions and across time is that during periods of economic recession or during periods when certain industries, at least, are going through difficult times, or certain plants are, that there does seem to be an upswing in claims that emanate from these as workers either are laid off or near layoff, or whatever - begin working fewer hours and the like.

I didn't believe or have any reason to suppose there was some political process that was at work that might have explained the 1975 swing up at J-M.

Q. You were not aware of the fact that the stomach cancer issue was in fact an issue in the 1975 election? In that year? It was the platform of a party within the ...

A. Well, I honestly can't recall, although what offends me about my poor memory in this is that I think you and I

A. (cont'd.) had some conversation about his, about a year ago.

Q. Probably.

A. This was an issue that was raised by a candidate that you were actively...that you...

Q. Well, I think it was actively pursued in the Legislature...

A. In the Legislature, to be sure.

Q. ...was the stomach cancer...or at least the laryngeal cancer was the subject of two Ombudsman programs on the CBC, the National Film Board has done a film about Emil Bertrand and it was a very highly-political issue at the time, and I guess...

A. No, I was exposed to that information and I think you may well have been the original source, but my understanding was that in 1975 there were also some economic changes going on at J-M.

Q. And some amendments to the Act, I think.

I think the thing that I would like to say...you suggested that there was very little political input into the guidelines as you saw. In fact, one of the things that we used in terms of pushing was Selikoff's study, for stomach cancer and laryngeal cancer, and the latency period essentially came out of the Selikoff studies - I mean, among others - but it was certainly used back to us when we worried about those people that would be denied compensation as a result of not meeting that particular guideline. We were told, well, you gave us the Selikoff study, and so I think there was some political input.

A. Could you explain that?

Q. Well, I think they took the evidence that some people were pushing upon them. and...

A. Who? Who was that?

Q. The New Democratic Party at the time, and the

Q. (cont'd.) labour movement, was pushing the Selikoff studies on the Board, to accept.

A. Right.

And you are saying that the Board...?

Q. I think that they accepted certainly the Selikoff studies in terms of laryngeal cancer, in addition to their own reviews and their own study, but the latency period certainly came out of, came strongly out of the Selikoff material.

A. There wasn't much other than the Selikoff material, I think, in 1975, to use...

Q. Right.

A. ...that would have been available.

Q. Fair enough.

A. You may be right. I'm not quarrelling with your observation. I'm just saying that I think, rightly or wrongly, there just wasn't a whole lot else out there if one was going to find a number or numbers, and the Selikoff study was inevitably where one would turn, especially in those particular cases, those cancers, those sites.

Q. In Professor Eissen's study, he talked about the fact that you didn't deal with the issue of burden of proof in those guidelines - that the burden of proof appears to be that you have to meet those criteria in order to gain compensation, and that puts an onus on the individual to meet the criteria, as opposed to putting an onus on the Board to meet a criteria to refuse claims, which might be a different approach.

Do you have any comments?

A. Well, I think that's right that I didn't raise that as a specific question or a specific issue, but my own view is that even in the world in which the burden ought to be or is largely on the Board, the presence of a guideline - which I have endorsed on other occasions and here this morning -

A. (cont'd.) does impose, obviously, certain kinds of barriers or hurdles for the worker. If the worker cannot meet those, it's not to say that the worker then obviously should not be compensated, but the guidelines do set up what are essentially potential obstacles, and by making them potential obstacles, it does impose the burden on those questions - how long were you exposed, where were you exposed, were you working near the substance.

It does impose some burden of proof, and to some extent that burden of proof cannot be avoided, I think, at least in some questions can't be avoided by the worker.

It's not necessarily a question of where they worked, because that can be done by the Board. The Board can make the inquiry, can send people out, whatever, but essentially a question of time limits, exposure rules and the like do impose certain burdens that do fall on the worker. There's no question about it. I'm going to accept that. But it seems to me to be a...there are benefits to the worker in having that type of guideline.

That is, there is a tradeoff and I would judge it to be one that the worker should not come out behind on. He doesn't lose.

DR. DUPRE: Could I just inject a question at this point? With respect to the political environment that prompted guidelines, my recollection of your study, although sometimes I mix it up with other studies that I know, is that you seem to recognize that in the case of the development of the AFDE guideline, the asbestos fiber dust effect guideline, there were political pressures at the origin of that, and I'm just trying to recall, was the time at which that guideline was developed roughly about the same time framework that you were referring to, Miss Jolley? So they are all part of the same thing?

MISS JOLLEY: Mmm-hmm.

DR. DUPRE: Okay. Thank you.

MISS JOLLEY: Q. In the files that you reviewed..

THE WITNESS: A. Can I interrupt, though?

Q. Yes.

A. Can I just comment on that?

I think there are two very separate issues, and one is politicization of something to develop a guideline, and the other is what the guideline itself looks like, and if I'm being consistent with what I said this morning, my preference would be a system whereby a number of different parties - not simply the scientific community, not simply policital leaders, not simply the WCB, has the opportunity minimally to raise the issue of 'do we need a guideline in the following area'.

So if that comes out of a political process or as a consequence of an impending election or convention or whatever, then sobeit. What I would view as something very different is if the product of that deliberation was too heavily politicized. In fact, I don't know why I qualify it. I would prefer it not to be politicized at all. I would prefer a system where it could be insulated from that, respectively insulated from that - not immune, but respectively insulated.

Q. The guidelines are not entirely scientific statements though. Professor Eissen draws that conclusion as well.

I mean, there's a lot of other things involved in the guideline, just as there are a lot of other things involved in setting standards, and it worries me that we leave that to...you didn't want uninformed people participating, that you didn't think it was necessary that the Board listen to the views of uninformed people around the development of guidelines, but guidelines are more than science. Would you agree that that's true?

A. Absolutely. Right. I certainly agree.

Q. Therefore would it not be justified that those

Q. (cont'd.) people affected ought to be able to participate?

A. I don't think I have ever suggested that they should somehow be prevented or excluded entirely. I think in reality the concern that I had was that if you had a group of eminent, respectable, professional individuals - again, not necessarily drawn just from M.D.'s, much less from the WCB - who would have to go through a very, very drawn-out process of, say public hearings, that might go on and on and on, and the input was largely repetitive and uninformed, I could visualize a process like that being very difficult for them to accept, to swallow.

Putting it more specifically, I could see them saying, 'I have better things to do with my time, I choose not to participate'.

What I would like to do is to structure it in such a way that you can encourage the very best people that you have in the province to be willing to participate in that kind of process. Not to hold them up to a process that they might find to be of little value and very costly in terms of time.

So the comment that I made, which I think may appear in the report, then seeks to balance that, all right? But certainly I'm not saying that the only people who should be allowed to speak or the only people that can come forward would be senior faculty members from the University of Toronto medical faculty, or whatever.

Q. I would hope not.

A. Sorry?

Q. I would hope not.

A. No. And indeed, and indeed, maybe this in a sense slightly reiterates the discussion I had this morning with Mr. McCombie. I would hope that some of it could be done by representatives, say, of groups, rather than all the members,

A. (cont'd.) individual members of the groups, coming forward and presenting positions and whatever.

Q. Can I just explore with you in the experience you had of going through the files that you did, one of the frustrations we have had in the labour movement has been the issue of exposure - how long, how much, where - and it has been a tough one because we have had to rely not on company data or Ministry of Labour data - mostly because there is none back then - assumptions are being made sometimes based on present conditions, and a lot of the work that we do in terms of our claims is to put together a picture of past experience, past jobs, interviews with other workers who talked about not being to see across the room, and that kind of thing, and I wonder if you have any comments on the problem of the exposure data, that you saw in the files.

Did you see that as a problem?

A. Well, my impression was that the work done by the claims adjudicator, when they were asked to go out, or the field people go out and try to better understand what the environment was at the time, was done ...first of all, it wasn't done very often. It wasn't needed. It didn't seem to be needed all that often. The issue of compensation or not, size of compensation, didn't revolve on that issue all that much, but I know there are some cases, some very important ones, where it did.

It didn't come up all that much, number one. Number two, where it did, it never appeared to me that the field inspectors were, say, on a terribly tight schedule, so that somehow they had to get everything ready and back in two days because they were going to be assigned to something else. I have the feeling that they were prepared to invest whatever time they could to try to come up with answers.

On the other hand, answers are very hard to come up with, and in some instances one can shrug their shoulders or

A. (cont'd.) throw up their hands and say, look, we don't even know who the fellow employees were, and we don't know whatever happened to the establishment - the establishment isn't there anymore - this is fifteen years ago or twenty years ago, and I think what you are left with, in some instances at least, are unanswerable questions on issues of how much exposure was there, what was the exposure like.

Now, on issues like that it seems to me you have an obvious issue of benefit of doubt, willingness to accept that if a certain kind of substance of a certain kind of process was being used in an establishment, that indeed the worker who pursued that line of work was likely to be exposed or not to be exposed, and again, there is plenty of uncertainty, plenty of unknowns, it's very unlikely that you can reconstruct accurately what the conditions were.

I don't know if that answers your question or not. I think the Board was conscientious, it was not a common situation - at least claims didn't seem to hang off it - on whether or not this was the situation, and it was a frustrating problem for them.

DR. DUPRE: If they are left with unanswerable questions, was it your impression that the benefit of the doubt was invariably applied?

THE WITNESS: Why did you have to ask that 'invariably'? You don't want to rephrase that?

DR. DUPRE: I'll probably try in a moment, but go ahead on it...

DR. UFFEN: I was raising the same issue, but in a slightly different way, in that you have dealt with the guidelines and you drew attention to the two guidelines that were apparent for asbestosis - a clear and adequate history of occupational exposure to asbestosis, and secondly a diagnosis of frank asbestosis.

DR. UFFEN: (cont'd.) The second one I have no reason to disbelieve that that's a medical decision best left to the medical people, but the first one - a clear and adequate history - seems to have been decided by the advisory committee on occupational chest diseases, which is made up of medical people.

Now, what I have never been able to get a grip on is why medical people are qualified to determine that first criterion, a clear and adequate history of exposure. I should think the workman would know better than a medical man what the conditions of exposure were.

Have I misunderstood something here, or...?

THE WITNESS: The problem with saying something has to be clear is that it's necessarily...that's vague.

DR. UFFEN: Clearly vague.

THE WITNESS: But I do think that you and I are seeing this as somewhat...in a somewhat different way. I think what the Board in this case is saying is that if an individual appears before the WCB, their x-rays appear before the WCB, there is plenty of evidence that this individual has a chest disorder and it appears as if, pretty clearly, that that chest disorder is asbestosis.

My question is, what if that individual never worked a day in their lives, to take an extreme case, never was employed by any employer, much less self-employed, in their history? Now, would that then be an automatically compensable situation?

The answer would be, no, because there is no adequate..there is no clear and adequate history of exposure related to the workplace.

Where did they encounter this...

DR. UFFEN: Well, there are other opportunities for being exposed to asbestos.

THE WITNESS: Well, of course. Of course. And what

THE WITNESS: (cont'd.) the Board is saying is, then, that the presence, that a second condition, a condition to make this compensable ought to be...

DR. UFFEN: Okay, that deals with occupational. I understand...you've drawn attention now to the occupational, but the thing that bothers me is a clear and adequate history of exposure. Now we come to the crux of it, it's the word exposure.

We;ve had testimony for two years now that has not resolved the question of how long to how much do you have to be exposed before you've been clearly exposed to an undesirable amount. That never has been resolved, and I fail to see how a group of medical practitioners are the sole ones to be able to decide whether the person's exposure was significant or not.

This is most easily demonstrated by the case of the demolition worker who may be, for a very short period of time - much less than the eight hours that is often used for measurement purposes - exposed to dust, fiber concentrations similar to those thirty or forty years ago.

Now, we don't put this to you just to be argumentative. It's a thing that we have had trouble coming to grips with and you drew attention to it, and so I would welcome anything that you could add, if you can, to this.

THE WITNESS: There is only one thing I can add, but I agree with you. The notion of a guideline that says there needs to be something that is both clear and adequate, without identifying what you mean by clear or adequate, is neither clear nor adequate.

I do know I have fun afoul of...at least one person has commented on this because I indicated I don't really know what the use of that kind of terminology means, but the one answer that I can perhaps give you that may shed some light on this is that in the vast majority of asbestosis claims that are rejected - either have always been rejected to initially rejected - in the vast majority,

THE WITNESS: (cont'd.) it is not that condition, it is not that element that causes the claim to be denied. If anything, while I found reading the claim files exciting and interesting and educational, edifying or whatever, the one thing that almost became boring was to see 'what is it that causes asbestosis claims to be denied', and that consistently, again and again and again is, we don't think this man has asbestosis, or he doesn't have enough asbestosis. That is, there may be very slight asbestosis, some evidence of some x-ray change...or, this man doesn't have asbestosis.

So the other issues is not what knocks you out of the box. That's the one that really becomes all-important.

Now I will not say, certainly not under oath, those were all of them. But it is the very, very large majority of denials for asbestosis.

DR. UFFEN: In which case, then, the opinion or the judgement of the advisory committee on occupational chest disease is a rational thing, because they are medically-trained experts. If that's the predominant...in other words, if we must think of this thing - two requirements, but one of them is much more important than the other?

THE WITNESS: In fact, in practice it is.

DR. UFFEN: In practice.

MISS JOLLEY: Q. But you are not...

DR. MUSTARD: Can I ask a question on that?

DR. UFFEN: Sorry. I took a long time on that.

DR. MUSTARD: In reading through your report, however, you indicate that the first claim may be denied, but subsequently it's granted. The diagnosis of asbestosis is an arbitrary diagnosis. It's based on a chest x-ray, a set of criteria, and it's based on physical examination criteria, but on a biological basis it's arbitrary, because pulmonary fibrosis, listening to the testimony of some of the experts, begins

DR. MUSTARD: (cont'd.) long before you can clinically make the diagnosis, and indeed in the testimony it's that if somebody came up with a more refined imaging technique, which would let you pick up the pulmonary changes earlier, your diagnosis would obviously come earlier in the history.

So one of the problems that comes up here in the benefit-of-the doubt question is that you start to apply it into the diagnosis, and this gets back to our earlier discussion this morning.

One is faced with the problem, when a claim comes in, as to the time at which you make the diagnosis based on the criteria that you put forth, is the word 'clear' history of exposure, etc., and it becomes a very difficult thing to sort out and I'm not sure, really, what the answer to this problem is.

But the problem has got another component to it, and the other component to it is the biological process itself - how much asbestos fiber you have to get in the lung to start the process, and how long it takes for it to become clinically manifest - and when you harness those two elements together in a problem such as this, it makes one concerned that there is again a judgement question that comes in which is maybe slightly beyond that of a medical opinion.

That is, you are now mushing together the biological data which we medically may not want to put out because it contravenes our diagnostic acumen, rather than to put it another way around to you. We are trained to make a diagnosis by certain things that we are given as we mature as physicians, but we always recognize that the process of lung cancer starts long before we can diagnose it.

We also recognize that you can develop new techniques which will allow you to measure that indeed cancer has occurred, before you can pick it up by other techniques.

DR. MUSTARD: (cont'd.) Now, there are a series of judgement questions that come up against that information, which have bothered me a little bit in this process because the question of how that shifting knowledge base should be applied may not be best left in the hands of the medical people. It might be best left in the hands of another group who takes a look at it and tries to weigh the different factors that are coming in, and so in setting up guidelines I guess my concern doesn't really solve the problem that Dr. Uffen has raised to you, which is - how do you cope with the changing knowledge base, the changing capacities to define an illness and diagnose it, in a system that's trying to be reasonably equitable? And do you leave that with a medical committee, or do you force it into another kind of review process?

Have I made myself clear?

THE WITNESS: Oh, very much so. I wish my answer could be as clear.

I don't have a very good answer, but let me make one or two suggestions. One is - there are two things I would like to respond, and neither one is an adequate answer.

One is, I frankly have some concern about what I regard as tradeoff being having an advisory committee that essentially makes that decision, it is going to make the decision, it makes all the decisions - extent of impairment, does he or doesn't he, assuming it gets to them and...where you don't get some regular infusion of fresh blood. Now, the tradeoff is between having people that are quite experienced, people who have looked at thousands and thousands and thousands of pictures, and between making certain that some of this fresh blood comes in, because there can be new insights and new experience and whatever.

So I guess my personality being a waffler, my preference would be obviously not to turn the whole ACOCD out overnight

THE WITNESS: (cont'd.) or every two years and get a whole new group, but I think an argument can be made for exactly the reason you suggest, that there may be something...I don't want to say there may be...there is a lot to be said for having some kind of gradual turnover of staff. It doesn't have to be dramatic, it can be every second year or every third year one new person be added.

That's a partial response to this. The other is that what you put your finger on is something I'm...what I think you put your finger on...is something I'm very pleased has come up, because I have been saying it at a number of different times - not today, but I'm saying it's hard to get people to accept it, and that is that while there are lots of things about asbestos and asbestos diseases that are dramatic and that excite people, and even are exciting enough to draw the media in, with all due respect, I think some of the biggest problems as a compensation board one finds is dealing with the seemingly prosaic and unexciting matters of asbestosis, its diagnosis, its evaluating the extent of either impairment or disability, and everytime there is a mesothelioma case, although there aren't, fortunately, all that many of them, it tends to divert attention from what I think are the much more difficult ones to deal with, the day-to-day ones, the almost two hundred and fifty successful ones and the plenty of other ones that over the past ten years the Board has had to deal with, and I would like to get people interested in some of those, as uninspiring as they are.

What I hear you saying...and I'm not trying to jump on your comments...what I hear you saying is, it's a very difficult problem, and there are a few obvious and good answers that are readily available to dealing with it.

DR. MUSTARD: As an aside, I almost feel that maybe what is needed is an advisory committee that's looking at the advances of biological knowledge and its application in this field,

DR. MUSTARD: (cont'd.) or its implications in terms of diagnostic procedures and screening of people, which is another burden, and this obviously means your criteria would keep shifting as the skills correspondingly enhanced, in terms of being able to detect changes.

I'm going to ask you how you could make that an equity across the system.

THE WITNESS: How about if you have members, though, of the ACOCD that are actively participating in some of these activities? Wouldn't that help?

DR. DUPRE: Before I hand you back to Miss Jolley, Professor Barth, I guess I had better go back to my question, which has to do with what I gather is something that involves a minority of claims, but these are claims where the Board is left with some unanswerable questions with respect to exposure. With respect to the principle of the doubt, I must try to pursue an answer to my question because my motivation in asking it has to do with the extent to which your impression would be that horizontal equity has been observed in the treatment of claims that pose some unanswerable questions about industrial exposure.

THE WITNESS: I apologize. I didn't mean, despite what I said earlier, to try to avoid answering your question. It's a very important one. But what you are asking for is my impression, and in a way it's a somewhat difficult impression to provide because especially where there are very few appeals, the kind of information available in the files, in the absence of the full appeal process, is very limited and doesn't shed a whole lot of light on how far the Board is willing to go.

In other words, since I couldn't follow up an individual claim and say how rigorous was the Board in trying to come up with this information that would have allowed them to compensate this worker, it's difficult for me to judge how adequate a job they did.

THE WITNESS: (cont'd.) Having said that, with that very strong caveat in place, I think the Board in many, if not most, instances does seek to give a considerable benefit of doubt to workers when it comes to an unknown such as exposure ten, fifteen or twenty years ago.

Again, I apologize for any delay.

MISS JOLLEY: Q. You made the comment, Professor Barth, that in fact the exposure was not the problem with asbestosis. In fact, most of the claims that we have had problems over exposure have been cancer claims and I think any of the appeals are based on that whole issue of how much, when, where, and what they were doing to be exposed.

THE WITNESS: A. Yes, I agree. No question about that.

I think the reason I commented as I did was, it was in regard to Dr. Uffen's comments about the asbestosis...quote, asbestosis guidelines...which I wonder if they really were guidelines, but, yes.

Q. One of the things that worries me a little bit about the setting of standards through the occupational health and safety division in Ontario is, will the standards have an impact on future compensation? In your review of the files, did you ever see a situation in which the companies had been meeting the, quote, occupational health and safety guidelines for asbestos and therefore were seen to be, quote, safe places to work, and therefore the exposure was not a problem?

A. I don't recall any such instance.

Q. Right.

A. I don't recall one.

Q. We have had situations where companies have tried to argue that, and I didn't know if that was a successful

Q. (cont'd.) argument or not.

A. There is a problem on the other side when one goes to lawsuits and allows for that in negligence. If they violate, even marginally, a safety and health requirement, is that sufficient to demonstrate that there was sufficient negligence to satisfy the need of the lawsuit. So it is a tricky question.

Q. It's of concern because standards are set in a political way...

A. Oh, yes.

Q. ...they are not necessarily to protect health, and therefore I would not want to see in the future standards being used against...for future compensation.

DR. DUPRE: Excuse me, Miss Jolley. Permit me to ask you this question.

I understood you to say that you have heard that firms may argue that if they have met a particular exposure guideline in the past, they should not be counted as the last employer to have exposed the worker to asbestos?

MISS JOLLEY: They have argued that, yes. I...my sense was that it was having no impact as far as the Board was concerned, but that was an argument being made.

DR. DUPRE: So they had argued this as a matter of policy, or they had argued this in a particular claims case?

MISS JOLLEY: In a particular claim.

DR. DUPRE: I see.

I gather from your review that any kind of appeal by an employer that he was not in fact an employer which had been in asbestos and had exposed a worker was very rare indeed.

THE WITNESS: Well, there are two elements. One, there are very...this doesn't come up very often, it comes up rarely, and two, when it's raised by an employer the Board tends to be pretty generous about forgiving or accepting of that, and says,

THE WITNESS: (cont'd.) all right, we accede that or we accept that, and so costs will be covered by the industrial classification.

MISS JOLLEY: Q. In fact, in the hearing loss cases, however...and I know that you didn't address that issue directly... they do consider the standard that one has to be exposed above the... I've forgotten what it is, ninety decibels for X number of years in order to receive compensation...and it worries me that that might be something that might come in.

The other issue I want to deal with that's something that certainly the guidelines do not have in them at the present time, but there is more and more attention being placed on it, and that's the multiple etiology of disease, etc., that smoking is responsible for this much of the lung cancer and asbestos is responsible for this much, and therefore the Board should only give the worker according to...have you ever thought about the possibility of if lifestyle implications do in fact enter the whole adjudication process, that perhaps cigarette companies ought to pay the rest? Or those people that make whatever it is that's going to hurt that other percentage ought to...

THE WITNESS: A. Yes, I have thought about it.

Q. What do you think about that?

A. I thought you were on the verge of asking four different questions before you got to your question mark...

Q. Probably.

A. ...and I was preparing to answer each one as you went along.

I can't really recall if I have changed my tune on this. I think at one time I testified publicly against that approach. I certainly now believe...you have to understand I'm a reformed cigarette smoker and that maybe says enough...but yes, I'm all for charging them and taxing them more and having them pay for

A. (cont'd.) many of the costs that society incurs because of that product.

I don't know if that directly answers your question.

Q. Yes.

I would just like to explore the Outreach program, because it was something that you were interested in, and there are a couple of things that came out in Dr. Dyer's testimony before the Royal Commission, and that was, you mentioned the fact that a number of companies in fact dropped companies - there were ninety-nine original companies identified and it went down to thirty-two - but you didn't explore why that happened. One of the things Dr. Dyer said to us was that a number of companies were dropped off the list because they no longer used asbestos.

Now, some of those, presumably, were no longer in existence, but it was a little bit worrisome because Johns-Manville no longer uses asbestos - would they be dropped off an Outreach program. Did you explore any of...

A. Well, I did, and I'll have to stretch my memory a little bit on that. My recollection is that I certainly did ask that - how did they go from the ninety-nine down to the one-third, that number, and my recollection is just a little bit different.

I had thought that part of it was...some of these were very, very small. I confess I'm going to have to mull that over, but I read Dr. Dyer's testimony on this and it didn't entirely square with my...it didn't ring a bell, but I was not terribly troubled by the reason that I was given as to why, how that screening occurred.

But, Miss Jolley, I just can't tell you right now what that is.

Q. I would like to pursue a question about your other study with Dr. Selikoff about asbestos survivors, or the survivors of asbestos victims, and the information about Canadian

Q. (cont'd.) asbestos workers, the Heat, Frost and Insulation workers that you interviewed in Canada, you said that forty-seven percent pursued death benefits, which meant that more than half of the Heat, Frost and Insulation workers who were probably more aware of asbestos than most unions...

A. By far.

Q. ...were not pursuing death benefits. Can you explain...I suppose you can't remember the Canadian data as opposed to the American data, but do you know why...

A. I don't think we sorted the Canadian data, certainly in terms of those questions, because, that is separately, because the number, as you know, of Canadian claims was so small that I don't think I could have any particular confidence in that.

Q. Right.

A. I can tell you what the general reasons were, but I can't give you, nor could I have when that study was done, because we didn't try to find out specifically what the reasons were in Canada.

Q. Can you recommend a greater Outreach program to us, that would overcome this reticence for people to pursue claims for industrial disease?

A. I guess I have a two-part answer to that. Many, many jurisdictions of the world don't do anything like Outreach programs, so that my feeling was that WCB of Ontario was to be praised for actively engaging in some Outreach activities. That is, without judging how effective or ineffective it might have been, or how effective or how much better it might have been, I think it should be identified that this is not frequently done.

Why it's not frequently done is beyond me. That I can't explain. But many agencies either feel they don't have the resources or it's beyond their responsibility. That was not the case here in Ontario, and I think the WCB is to be praised for that.

A. (cont'd.) I think, unlike the testimony that you have had here previously, that the results of the Outreach program were not impressive. But I can't be very honest in praising on the one hand and damning on the other - praising for undertaking it and saying, but you know, they didn't get many people through it.

I think it was not a successful program if one looks at the outcome, but it's a praiseworthy effort and it's one that ought to be operated on a continuing basis.

Now, can I just add one small part to that? Certainly based on the U.S. experience the reason the people don't seek benefits, based on this very limited group from whom would certainly expect that they should, people dying of asbestosis being told by their physicians that they had asbestosis - nothing exotic, nothing else - and they themselves, while they were disabled, or their survivors after their death didn't pursue compensation claims, so the argument can't just be ignorance of what it was or its link to the workplace, and these were asbestos workers.

There are several reasons why consistently, pretty consistently, why people didn't seek benefits. The way I generally describe it is one of ignorance - ignorance as to what peoples' legal rights are, what their entitlements are, much less that certain kinds of illnesses can be attributable to certain kinds of exposures, that certain kinds of exposures can lead to the diseases that can disable and kill.

The bottom line, Miss Jolley, is, I wish I could point you in the direction of very successful Outreach programs in contrast to what I found here. I can't, but it's not to suggest that because of that one should stop trying. I think one should seek better ways, other ways, additional ways to make the public, to make employers, to make unions, to make government agencies aware that there are these rights that individuals have.

A. (cont'd.) And by the way, to make the medical community aware of it, too. The medical community means hospitals as well as physicians. And try to get that across, because that, at least in the U.S., by and large the U.S., very definitely by and large U.S., were the reasons people weren't filing claims - they didn't know they could.

In other instances, they didn't know what the disease was, didn't know what the disease was that might have killed their husband, or they didn't know what the source of the disease was even if they knew the right disease.

It does call for education, and asbestos is easy.

Q. An interesting aside to an occupational health and safety standard, and we have a new asbestos standard now in Ontario, and there is a requirement within the standard for some education, etc., and there is also an obligation on the part of the employer to acquaint workers with hazards, etc. It might be a possibility that that kind of acquainting would also acquaint them with the rights to compensation for the diseases connected. I mean, the standards are presumably being set for diseases that we have identified, so that might be a possibility.

Would that be...

A. Yes. I'm nodding my head in agreement.

Q. Okay.

A. And it's surprising. I think, maybe wrongly, but I think most workers in Ontario probably know that if they slip and fall at their work bench today and they can't work for the next three weeks, that they are eligible for workers' compensation. I don't think they need a whole lot of advice that they have that right, but apparently neither they or their survivors are aware that in the case of some serious diseases that they have a similar kind of right.

Q. I just have two last questions, and the one

Q. (cont'd.) question - have you ever explored or has anyone ever explored the issue of compensating family members?

In the testimony before the Senate Committee...I think it was the Senate Committee...we had a presentation by Paul Kotin where he discussed the whole issue of compensation, and it was their testimony and I think it was a Mr. McKinney, who is the chairman of the board of Johns-Manville, made the argument that in fact a compensation system ought to compensate the family members as well if they have been secondarily exposed by the worker.

I thought it was particularly gracious offer on the part of the corporation.

A. There are reasons.

Q. Yes, I'm aware of those reasons, but do you see that as a potential thrust to investigate?

A. That idea was first proposed, so far as I can tell, by anybody, by me in that report in 1976, and is in the 1980 book. So on that score I haven't changed my mind.

By the way, the reason I would like that to be there is not different from the reason that J-M wants to see it, although my stake and theirs are different. I think it's a much more sensible way to proceed than to go to lawsuit.

On the other hand, you have a problem - but not a terrible one - in fact, I deal with it - you have a small problem as to what the level of compensation might be for, say, a nonworking spouse, a fifteen year old child or whatever, because the worker ... death cases, obviously, in Ontario are different, but in the case of disability the worker's benefit is tied to his or her previous earnings. What do you do in the case of family members?

But in a simplistic way I didn't find that to be an insuperable problem in suggesting one or two possible ways to get around it. Certainly I endorse the idea and commend you for suggesting it today.

Q. We don't have that many offers from Johns-Manville.

A. Any offer you can give them that allows them to minimize their lawsuits would be acceptable.

Q. The last area I wanted to explore, and that was that I am wondering if you have any evidence to indicate that asbestos workers or other kinds of workers who may suffer in the future from a potential disease experience discrimination in employment.

We had a situation, if I could just give you background as to why...at Elliott Lake, for example...where the Elliott Lake miners found it very difficult to get employment in other mines, for example, because the other mines did not want to pick up the compensation problem, and there were adjustments made so that now it's easier to move around.

Have you seen that in any of the studies you have done? Have you seen workers discriminated against for future employment if they want to move to somewhere else, because they are afraid of the potential health problems there?

A. One response that comes to mind is that in 1976, when I take a tour of a number of different countries - forgetting the visit here to Ontario, the European countries - that issue was one that concerned me a great deal. That issue came up again and again, but almost invariably it came up only in terms of miners.

Now, I have no reason to suppose it's exclusive to mining communities. I suppose with a little bit of superficial searching one can imagine why it's particularly problematic for miners. It is a problem that exists in lots of different places and it is, if not exclusively, probably very largely their problem.

I honestly don't know what to do about it, and I'm not sure that...when I say I don't know what to do about it, I'm not sure that my concern is one of employment discrimination as opposed to a concern about further exposure to a hazard that will

A. (cont'd.) more readily end that individual's working life. That's a very difficult situation and one that turns out, I think, to be as difficult for the labour movement to resolve on intellectual grounds as it is, once you have gotten that resolution, to seek some satisfaction politically for it.

Q. And if I can take one more question, which I thought that was the last, but you made a statement in your last chapter that in fact the claims that went to the MPP's really did not affect the outcome, although you did indicate that they were treated slightly differently, and Terry Eissen drew the statement that perhaps that in itself was a special treatment, but you have to admit that in some circumstances political intervention has created claims, or has...we have the example of Odette Dodds, where clearly that was a political intervention which was overturned by the corporate board. Would you agree that that's true?

A. I would agree that that kind of intervention can have an impact. On ther other hand, I can't see where it has any impact, in fact is even known, at least at the initial level, to the people that do make most of the decisions - that is, either the ACOCD or the medical services division. I'm not sure they have access...I mean, ultimately when they pull back the file they might see there is a letter, but that probably is after there has been an exchange of correspondence between, in this case Mr. Alexander or his predecessor, and an MPP.

Mr. Eissen, Professor Eissen criticized me and probably correctly so for making that comment based on just a very small number of cases.

On the other hand, I thought it would be unfair if I were to hide behind...a little unfair...I think his judgement is right. On the other hand I thought it would be unfair if I just said look, I don't have enough data so I better not say anything.

A. (cont'd.) I was struck, in a number of instances, by a letter arriving on the first of June, and five days later a quick negative decision reached, say, by Dr. Stewart or Dr. Dyer or by the ACOCD, almost as if they were saying 'to hell with you'.

Now, they didn't, because I don't think they saw these letters. The letters weren't addressed to them. The timing of it would, might have been otherwise, but they were just then denied, there might not have been an appeal, no sense that there was a telephone call from one of the upper floors down to the medical services division saying 'hey, we've got one here that deserves special treatment'.

That was a sense that I had and thought I would share it, but I confess that the number was not very large and so certainly wouldn't want to make that a strong scientific kind of statement.

MISS JOLLEY: Those are all my questions, thank you.

THE WITNESS: Thank you very much.

DR. DUPRE: Just let me ask a question on that. I would have thought, without looking at any of the material that you look at, Dr. Barth, that intervention by members of the legislature with respect to claimants would, in nearly all instances that I can think of, normally follow some initial decision by the Board, so that as a result neither the medical services division nor the ACOCD could conceivably be aware of something that is only triggered once they have made a decision in the first place.

THE WITNESS: Well, I think that's a good observation. However, many of the few letters seemed more interested in what the complaints that arose initially with claimants about delays.

DR. DUPRE: I see. Okay.

THE WITNESS: As opposed to negative decisions or decisions that were positive, but the impairment assessment level

THE WITNESS: (cont'd.) was too low.

And if I had to bet, and I would just as soon not, I would bet more of the letters dealt with delays than with rejections.

DR. UFFEN: Could I just ask a quick question here, and I was wanting to ask this before, but the people that are employed in the appeals division...I don't mean the board members, I mean the... what are they called now?

THE WITNESS: The appeals adjudicators.

DR. UFFEN: The adjudicators. Are they under any kind of obligation to not make comments to anyone about any cases? Are they sworn in any way to confidential procedures?

THE WITNESS: I don't know. I don't know the answer to that.

DR. UFFEN: I suspect if they were formally, we would have been told so.

Let me put something to you as an ordinary citizen, and I'm going to refer to it as the perception of the situation. We understand that there is no communication from the appeals people back down, and so on, but my understanding was that many of the people that do the appeals adjudication are up from the ranks - they come from previous employment in other parts of the Board - they've been working together for many years, they are housed in the same building. It's hard for an ordinary individual to believe that they don't talk to their own pals, and if there is no formal requirement that they keep confidential those appeals documents, it's not unreasonable for somebody to think occasionally they may talk shop over lunch, but it's hard for a lot of people to perceive a system of this type with that much security in it.

THE WITNESS: Are you also suggesting that that might be an answer to the question that Mr. Starkman...that I could not answer earlier, about...

DR. UFFEN: I'm not suggesting that you answer. I'm just suggesting it's a perception that people would have difficulty with.

THE WITNESS: The question was, why is it that there seem to be so few appeals, what is it that causes workers not to take advantage of a right that they have, and when they are denied... when they have a claim and they are told it's a...

DR. UFFEN: Rightly or wrongly, what's the use?

THE WITNESS: Right. That maybe...if your perception is a widely-held one, then maybe that may be, but I have no reasons to suppose that it is.

DR. UFFEN: I know you didn't get into the organizational structure a great deal, but we've had testimony on it and it happens to be on the board over there now, and the career development of a long-serving employee of the Board can take them into the appeals procedure and then out again, if he wants to get promoted he can apply for other positions more senior, and this type of career path, again, raises a perceived doubt about communications and leaks, or whatever you want to call them.

Now, I've made an observation and I'll put a question: Did you see any evidence of a communication system other than the chain of command that's shown in the organization chart?

THE WITNESS: No, I did not. But as you speak, I'm wondering about judicial systems that may suffer from similar kinds of situations, although they may not operate in similar buildings and share common cafeterias.

I don't know what sins are being committed in those cafeterias.

DR. DUPRE: Just one footnote to this, Dr. Barth, which I feel compelled to ask in terms of why people don't appeal. I think I've already raised this with one of the officials, at least, of the WCB who appeared before us, and I just wanted to

DR. DUPRE: (cont'd.) run it past you because in your study you very helpfully provided the copies of all the letters that are sent to the claimant, and my view, which you can qualify as a layman's view, it's much lower than that, and my view as a professor of public administration is very simply that workers are not informed that they have a right to appeal, because the standard paragraph that appears in all these letters reads:

"If you have any reasons to object to this decision, or have any concerns or questions about the matter, please let us know as soon as possible".

Now, that certainly does not in any way convey to me that the Board is in fact communicating that you have a right to appeal and exactly all the ways that the Board has been so careful to set things up.

THE WITNESS: Well, you have a good point. Let me in turn respond with a question. If you were not a public administrator but a layperson, and you got a letter that said you have the right of legal appeal, you can go to the following appellate body, etc., would you be intimidated by what might appear to be legalistic, formal, possibly costly? Which is not necessarily to defend this language, but to wonder whether a more explicit statement might not equally, if you are correct, might not yield the same kind of nonresponse.

DR. DUPRE: Thank you for that, because you have enabled me to indeed share with you exactly the worry I've had about this, which is exactly how one phrases it. But among other things, of course, it has occurred to me that informing the individual that there are workers' advocates...

THE WITNESS: Advisors.

DR. DUPRE: Advisors, to whom he can turn, etc., etc., because any claim is indeed appealable, might get us between the Scylla and Charybdis of noninformation on the one hand and intimidation of legalese on the other.

DR. DUPRE: (cont'd.) Mr. McCombie?

MR. McCOMBIE: If I could interject, I find myself in the very uncomfortable position of defending the Compensation Board.

As far as I know, every claims review branch decision that goes out encloses a pamphlet saying 'your right of appeal', which I don't think is reproduced in the report, so there is a pamphlet which is in several languages, outlining the steps to be taken in order to make an appeal, and I presume that they also go out in claims review branch decisions on asbestos-related cases.

DR. DUPRE: Thank you very much.

I wonder, Mr. Edwards, if it will be possible for you to ensure that we get that pamphlet?

MR. EDWARDS: Yes, I'll make arrangements, Mr. Chairman.

DR. DUPRE: Dr. Mustard?

DR. MUSTARD: In discussing the question of appeal and why people do not use it, have you in any of your review of this problem in any jurisdiction, or do you know of anyone, who has looked at the background of the individuals that might take up the appeal? What I'm trying to get it is a problem that can be shown in some of the health care services in developed countries such as the United Kingdom, that you create a publicly-funded health care system, you make it universally available, but then when you look at the use of the system by socioeconomic class, which the United Kingdom has in spades, which also tends to relate to educational background, you find that the population with the greatest burden of illness makes, in proportion to the amount of illness they have, much less use of the system than the more highly educated population base.

Now, when you come into the compensation question, is there any evidence that the same problem exists, although you set

DR. MUSTARD: (cont'd.) it up with good, solid middle class values and a standard educational sense of lawyers, administrators and even physicians, when you translate it into an operating thing in the system, has anybody tested how easily the members of the work force, particularly people who may have a much lower level of education, are able to use that in terms of an appeal process? Is there a barrier to understanding and use that we are really not paying attention to, or is that just a figment of my imagination which only really is applicable in the health care system?

THE WITNESS: There are two things I could draw upon. One, I'm aware of a study that is now being done and will not be done for quite awhile, but for us is being done, looking at, among other questions, this one - in California.

I think it's too early for them to share what their findings are. They are wrestling with what they are doing with the massive amount of information that they have right now, but it is of concern to some.

Secondly, it may be heroic but going back to the question, the issue that I exchanged with Ms. Jolley before, I would be willing...what would be heroic would be to suggest maybe the same people who aren't filing claims have characteristics of those people who are likely not to appeal, and there are certain characteristics of people who are likely not to seek compensation benefits, that one can generalize about, that may be very close to those who are either passive or ready to accept, or intimidated or frightened, uninformed enough, whatever, to not make use of that other right, the right to appeal.

One of the things that comes through, I think, pretty clearly in that study that we have talked about was that elderly people, especially elderly widows, are much, much less likely to go after compensation, even though they have every right

THE WITNESS: (cont'd.) to do so, as much as a much younger...

DR. DUPRE: This is in the Selikoff study?

THE WITNESS: Well, it's my study with the Selikoff data.

DR. DUPRE: Right. Okay.

THE WITNESS: Yes. That older people have a clearly disproportionate tendency to not make use of their legal rights, compared to younger people.

DR. MUSTARD: Do you have the educational level in that data base as well?

THE WITNESS: No. No, we don't have it. We would have liked to, but we don't have it.

DR. DUPRE: Mr. Edwards.

MR. EDWARDS: I have no questions, thank you, Mr. Chairman.

DR. DUPRE: Going to the bottom of the batting order...

MR. LASKIN: The bottom of the batting order - relegated to the basement like some baseball teams I know.

I just have a few questions, Professor Barth.

CROSS-EXAMINATION BY MR. LASKIN

Q. Can we turn to one issue which I don't think we have talked about today, and that's rehabilitation? Can I ask you, first of all, do you accept that rehabilitation programs are a worthwhile objective of a compensation agency?

A. There are different forms of rehabilitation, but whichever one you would choose to discuss I would say would be a worthwhile activity, a desirable activity for a compensation agency to be involved in.

Q. Is it, in your experience, is it an activity that's fairly common or uncommon to compensation agencies?

A. There's a very, very, I think, very clear answer to that. Every compensation agency that I've ever heard of, much less visited, had some familiarity with, had some exposure to - everyone of them gives a great deal of lip service to the notion of rehabilitation, and virtually none of them do anything about it.

Now, Ontario is held up around the world as a model jurisdiction in the area of rehabilitation. I'm not equipped to comment on whether that is justified in an absolute sense, but I can't quarrel with it being justified on a relative basis.

The rehabilitation area, as it overlaps with workers' compensation, the rehabilitation services provided to injured workers, certainly in the U.S. and in other countries as well, although there are some that are pretty good now, in the U.S. especially are unbelievably poor, unbelievably poor.

One of the reasons it's so unbelievable is that it's not for lack of resources that are occasionally put into it. It's just bad co-ordination, federal-versus-state problems.

But the answer to your question is yes, I certainly endorse the idea and my understanding is the general sense of people in the compensation community is that Ontario is close to being at the forefront.

Q. Can you elaborate on that? What has given rise to that feeling in the compensation community?

A. I think there are probably a number of things that have been important. The one that comes mostly to my mind is that there are not many jurisdictions - British Columbia would be an exception - there are not many jurisdictions where the compensation agency operates its own hospital, and I think that probably gives this WCB an important leg up, because you have the worker in a setting and time where there is an opportunity to think about rehabilitation. Most other agencies don't have such a facility. There is no such facility.

A. (cont'd.) I think that part of the credit that the province has received, or the Board historically has received, is attributable to that facility.

I don't mean to either not credit some other parts of the agency or put it all there, but that's the one that comes to mind.

Q. I suppose in the terms that we deal with asbestos or industrial diseases specifically, and apart from the ordinary general rehabilitation schemes and programs within the WCB, there is also the so-called special schemes which, and special programs, which you addressed in your report, indeed, and can I leave aside the general program for a minute and come to the special program, and particularly the program at Johns-Manville, and I certainly read your comments in your report and I suppose what I'm looking for is what lessons should one take away from that kind of special program? You know, if you could go back and put yourself back in time in 1976, you know, with the knowledge of hindsight and your experience and judgement, you know, would you rewrite the program? What might you do differently or would you not even embark on that kind of special program?

A. Well, we certainly have the benefit of hindsight. One of the elements of hindsight that we may or may not have is the perception that the Elliott Lake program was successful, and it seems to me that what I should have done and did not do was to learn more about why that perception exists, that Elliott Lake worked, and perhaps what is it that was done at Elliott Lake that was not done in the SRAP...which was not the Manville program, although it worked out to be the Manville program. It didn't start as just the Manville program.

I think that's number one. Number two, I think it was probably started too hastily. Something had to get off the ground, had to because there had to be some sign of movement, and

A. (cont'd.) the parties, the Board didn't have its act entirely in line and there was just terrible relations that developed between J-M and the Board...between the union and the Board.

The recollection of some of J-M's management isn't altogether positive either. Their view of the program, at least in the one instance of the individual at J-M that I spoke to, was not positive either about the outcome of this program, so I would say that the goals ought to be worked out clearly well in advance, perhaps a little more time invested in precisely what is it that we are trying to accomplish and how. There were some changes in the program that were made, maybe out of necessity but maybe, in the light of that, we can now think that through again.

I haven't answered your question very directly, but I may have earlier by suggesting that maybe what ought to be done is that somebody ought to look in a little more detail at the Elliott Lake program, which is thought of as a success, and then maybe hold that up against my clearly short, very short, description of the SRAP - look at that in a little more detail and then try to answer your question.

Q. That's fair.

DR. UFFEN: Would you like to suggest what you might think is the best way to go about it? I can think of three right off...I mean, ask the WCB to do it internally, or as you suggested here they might commission an expert, or thirdly, it might be done in a wider context to give it perspective.

THE WITNESS: Well, I think any one of the three could possibly come up with very similar kinds of findings, or a similar-looking report, but having been asked I would have to express a very clear preference for the third one, on the grounds that even if I know that the report would look the same regardless which of the three routes you chose, selected, the reception by the public and by the interested parties I think could be expected to

THE WITNESS: (cont'd.) be better to a report that wasn't commissioned inhouse - where it's done inhouse or commissioned by the WCB - which is not to impugn....far from it...not to impugn the integrity of the WCB, but to suggest that those people who would read the report may unjustifiably suspect it no matter what it says. Why run that risk when the third possibility could be available?

DR. UFFEN: Do you think this Commission could or should undertake to do itself? Or would it be something that would take too long a period?

THE WITNESS: Well, since I'm certain I would not be the one to do it, I think it could be done quickly and cheaply. I think it could be done rather quickly.

I don't know...have a good idea of what the time schedule is that is left for your Commission, but...

DR. UFFEN: Perhaps we could tie down what you mean by quickly, just a little closer. Do you mean three or four months? Do you mean...

THE WITNESS: I would think so.

DR. UFFEN: ...three or four weeks?

THE WITNESS: Well, it depends. If you take, for example, an academic, an individual who is employed as an academic, given that you are about to enter the...

DR. UFFEN: It could take three years.

THE WITNESS: I have to object there.

Well, you are getting into the academic season and sothat's going to, say, if you could wait between now and December, and Dr. Uffen it also depends whether the individual starts with a working knowledge of any of this, or the background of the Commission, or starts entirely from scratch.

But I think it's manageable, certainly before the end of the calendar year, and it would be my guess, if I were handed

THE WITNESS: (cont'd.) an assignment of this sort.

MR. LASKIN: Q. In the testimony that we've had, one of a number of factors that was isolated as perhaps making a program more difficult, or at least detracting from its possible effectiveness, was the age distribution of the working population at Johns-Manville that you were trying to rehabilitate.

I suppose...I don't know if you have ever had any other experience in other jurisdictions with this kind of program, and if you have, I mean how feasible is it when you are talking about people who have some evidence of industrial disease in their mid-to-late fifties, early sixties, to embark on that kind of a program?

THE WITNESS: A. Well, if you are saying that we should expect to throw in the towel, I would be very loathe to do that. I think that the costs of trying to pursue this may be high, but I think the benefits from some successes can overshadow those costs.

There is no question...I think I pointed out in the report some of the handicaps in trying to rehabilitate some of the Manville people, and their age, their education are important factors. And as Dr. Mustard pointed out, there are certain attitudinal problems. Once you say you have sufficient asbestos disease to warrant participating in this program, what does it do to their attitude towards starting off on a new career, for example, or taking training or going to a community college, as I think at least one of the trainees I know was urged to attend community or local two-year school, junior college...someone in their mid-fifties, I think it was.

So it's not the easiest thing in the world, but I think mid-fifties aren't all that old and one should be prepared to...well, I'm not speaking from experience now, but...

Q. Can I just turn to another topic, and I just want to pursue just very briefly a couple of issues which my colleagues

Q. (cont'd.) raised, and I just want to make sure I understand the extent to which the written statements and directives from the Board actually accord with the practice of the Board, at least so far as you have been able to discern it from the files you have looked at, and can I just come back to the burden of proof issue and I won't pursue it too greatly, but I think in answer to the Chairman you essentially said from your review of the files, certainly on the exposure question, if it was a difficult question the Board tended to do what it could for the worker.

A. Yes.

Q. What about the benefit of the doubt insofar as medical questions are concerned, which I suppose concerns me to some extent in light of the testimony I have heard. I mean, it's one thing...we have heard some evidence that the principle may not even be communicated to some of the medical people that are making decisions, but leaving that problem aside, is there a problem that the principle is there but it's an empty principle - it's all very well to say it, but is it in fact being applied by the medical people?

A. Well, I have to confess that I'm aware that Dr. Gray was here and testified and said that he was unaware that this was a Board policy, and so I don't start with a completely clean slate on that. I'm aware that he indicated that.

I would simply say that I'm not surprised either that he was...I mean, in light of what I have learned that as a member of the ACOCD that he was never given explicit understanding that this was a Board practice or policy, nor, in reading those files, am I surprised that he was unaware of it. I didn't see... which is not to say the Board, the ACOCD or the medical services division were tight-fisted or harsh, but I didn't either see that that principle was broadly applied.

If forced to say, I think I did see some of it in

A. (cont'd.) practice by, say, claims adjudicators, to the extent that they could, and by other arms of the WCB, but I didn't see...I was not overwhelmed with the provision of the benefit of the doubt in the case of the medical side.

Q. The medical side. Fair enough.

Let me turn to the second issue, and that's smoking. Now, everything we have heard and everything we have read from the guidelines tells us that smoking is not considered a factor in compensating for asbestos-related diseases, and my question to you is, you have looked at a number of files, does the statement accord with the reality?

A. First, at least one of the guidelines, a nonasbestos guideline, one of the lung cancer guidelines originally did sort out cigarette smoking and noncigarette smoking as a criterion in the guidelines, so that the Board is not without any history of concern about cigarette smoking. But this doesn't appear in the asbestos guidelines.

To answer your question specifically, and then generally, specificas are, yes. In the correspondence from the person on the ACOCD to Dr. Dyer or Dr. Stewart, which describes the individual's condition, there...I won't say often...there frequently is some reference to the smoking habits, present or absent, of the worker that has been examined.

Now, that's all I can say with certainty. I have seen that. That's in writing. That does go in correspondence.

The question that I can't answer is, even if there is no guideline, even if there is nothing explicit, even if the Board would say 'we don't care', when you are dealing, say, with a group like the ACOCD it's hard for me to believe that when they have examined a person who has a record of long-term substantial cigarette smoking that that may not, unconsciously at least, enter into their thinking.

A. (cont'd.) The alternative would be to say here is a physician who gives a pretty full examination of a worker and doesn't ask the question 'are you a smoker'.

I couldn't imagine, in the case where you were evaluating a chest disorder that you don't ask the question. On the other hand, if you do ask it and you know the answer, I would guess that it would, for some people at least, unconsciously or otherwise, affect their judgement.

Q. Thanks on that, and let me turn to another one. That gets back to the guidelines again and I won't pursue this distinction between the schedule and the guidelines, but let's just take the asbestos guideline, and what we seem to have on the one extreme is a guideline - and I'm talking about mesothelioma - that really nobody pays any attention to, and I suppose one may query what's the value of having the guideline for mesothelioma because the practical matter is that it's not adhered to in practice.

I'll leave that side for the moment. The other guideline, the one that really concerns me is the lung cancer guideline, and I suppose my concern is, I'm going to ask you in terms of the files you looked at, is whether the catchall provision, the provision that says if you don't fall within the guidelines, each individual case should be judged on its merits, whether indeed that is also an empty statement or whether that principle is really effectively adhered to. I suppose the concern that I ask you about is, as our Chairman has used the phrase, eligibility criteria, but is the lung cancer guideline just that? I mean, if you meet the guideline, you get compensation; if you don't meet the guideline, the practical tendency of the people judging the situation is to say sorry, no compensation.

A. I would say that you are right on the mesothelioma. Indeed, I'm not certain there is a need for the guideline anymore. Certainly if there is to be a mesothelioma guideline, it needs to

A. (cont'd.) be revised because it isn't doing anything at the present time.

In terms of the lung cancer guideline, I see that as playing a different role. It does screen...I view it as screening in individuals, making them eligible, if you will, but not regularly serving to make some ineligible.

So in answer to your question, I don't think the catchall is just windowdressing. I think if I were unfortunate enough to have to depend upon this as a former asbestos worker, I damn well would hope that I could meet the guidelines, because it would provide me with almost certainty.

If I didn't meet the guidelines, knowing what I know, having seen the several files that I looked at, I would not say all hope is lost. I think there is a chance, and in fact I think you may have even seen some numbers, some proportions, and those demonstrate to some extent the willingness the Board has to look at each case on its own merits where they don't meet the guidelines.

So I see it as the guidelines do matter, they kind of assure compensation if you meet them. If you don't, it's a lot tougher but it doesn't mean that it's an absolute bar to compensation, not at all.

Q. I take it you make the same judgement with respect to GI cancer and laryngeal cancer?

A. Yes, I do.

Q. Fair enough. Just a last question on this area, and that gets to the question of impairment versus disability and so on, and accepting that the Board's approach as mandated by Statute is to look at impairment, and you indicated that there have been occasions in other areas where, notwithstanding that, some disability criteria have been applied to determine benefits...

A. You mean in the comments I made earlier...

Q. Yes.

A. ...or the reference in the text to dermatitis?

Q. To dermatitis.

A. Okay.

Q. Can I ask you in the asbestos field, having looked at a number of files, I wasn't clear from the report, did you find any evidence on any of the asbestos files themselves that any of the medical people, for example, were bringing into play factors which might properly be characterized as going to the issue of disability as opposed to impairment?

A. I think on occasion references could be found in, again, correspondence from the chair of that individual's committees, say the physician, back to the Board through Dr. Stewart typically, that were sometimes somewhat suggestive of socioeconomic factors, but if forced to make a more sweeping statement, impairment knocks out disability most of the time. A large percentage of the time it is strictly impairment, but you can find references to what I would regard as some other issues that again, consciously or unconsciously, can affect how you value the extent of impairment or disability.

Q. Okay. One other issue, and it's a large issue and I don't intend to pursue it in a lot of detail, but let me ask you a general question about it, and that's Professor Weiler's White Paper, because...which I think came out, certainly the White Paper, I think, came out after your report, although the Green Book may have preceded your report, and I know there is nothing in your report on Professor Weiler's work.

Can I ask you first of all whether you have had an opportunity to review any of it?

A. Well, I have read the Green Book and read the White Paper, and you are right, there is no reference at all to either in my report.

Q. Okay. Having said that, can you leave us with any

Q. (cont'd.) general comments as to whether, from your perspective and from the perspective of looking at asbestos, whether you endorse his proposals?

A. As you have no doubt found in the last few hours, I tend to be somewhat cautious - qualifying most statements because I feel awkward about being so unabashedly supportive of Professor Weiler. Let's say this, there are twenty-one issues identified as issues for change in the White Paper, and scanning them this morning I would say I am very enthusiastic about approximately twenty and a half of them.

The half that I can't...it's largely a matter of disinterest on my part. I'm not persuaded, but I'm not opposed.

But I think it would be an excellent step.

DR. DUPRE: Could you share with us what that half is?

THE WITNESS: I wondered who was going to ask me that.

This was a matter that you...this is a matter..well, this is a matter of the notion of the corporate board, an outside board of directors versus the corporate board itself. I don't have a good enough feeling based on the limited exposure that I had to the WCB of how important it is to move in that direction, or how much of an obvious improvement that would be.

Again, it's not that I'm opposed to it. I just don't feel it's compelling. The other twenty I think are...I like. I endorse them.

MR. LASKIN: Q. One of which, I take it, would include the medical review panels?

THE WITNESS: A. Unquestionably.

Q. If we take the medical review panels...

A. Especially as applied by someone like Professor Eissen.

Q. And you, I take it from listening to the kinds

Q. (cont'd.) of work you have done in the compensation field, have had a particular interest and have looked at medical review panels. At least I gathered that was one of the things you were asked to do by the department of labour.

A. Yes.

Q. Do you have any special, specific advice to us as to the use of medical review panels in asbestos cases? I mean, should we be careful about the way they are designed, the way they are formed?

A. I'm sorry, I...

Q. Do you see any particular problems in using them in asbestos cases?

A. I cannot. Not distinct from say silicosis, hearing loss, psychological disorders or back injuries. I cannot think of anything different.

Q. One last question and it's this: I know we have had some discussion about the various critiques of your report that have been submitted to the Commission. One of the last to come in was the critique from the Board itself. I don't know whether you have had an opportunity to look at that critique, have you?

A. Yes, I did.

Q. I'm not asking you to go through it page by page, but I certainly invite you, if you have any comments on that document generally or any particular, specific issues that you would like to address, then by all means do so, Professor Barth.

A. Well, thank you. I guess my general reaction is one of disappointment in that it appears that the document was prepared by someone who either read my report quickly or superficially or for some reason was unable to understand it, but I found that there were...it was replete with some factual errors and that a number of instances where there is no obvious disagreement with me... that is by me, with what is asserted in the paper, the paper

A. (cont'd.) suggests that somehow I have said something otherwise, so part of my objection to objections as stated here is that I didn't disagree with what they said in the first place. I didn't say what they suggest I have said, and I'm in the awkward position of disagreeing because I agree with them.

But on other matters I disagree with what they say because they are factually wrong, and I'm simply surprised, I think I have to say, because I think the report was available to them for some time and this one is dated August 6th, so I'm perplexed that this is just a product of speed, of some urgency to get this to your Commission.

Q. Fair enough.

DR. DUPRE: Might I just ask if one of those elements of facts involves the respective estimates of how long the ACOCD process takes? I am mindful of what you say on page two-sixteen, 'from the time that a routine asbestosis claim is filed until the ACOCD reports a finding to the Board's chest consultant, six months usually has elapsed'...

THE WITNESS: Yes.

DR. DUPRE: ...and I recall that the correction that is offered by that critique is the claim that it's a matter of thirty-four working days or roughly seven weeks.

THE WITNESS: Yes. That's one area.

Now, I don't remember exactly where that reference is made, but the language that is used, at least in one of the places, is artful because it doesn't refer to the same thing that I do. I refer from the time a claim is filed, is introduced to the Commission, to the time a decision is reached by the ACOCD and communicated to the chest consultant.

I think...at least that their reference of time begins earlier, and perhaps not. They say, I think...and I don't

THE WITNESS: (cont'd.) want to go through a kind of word-for-word denial or argument...but I think their argument is here that it was determined that the estimated time from the time that the request was made by the claims memo until the advisory committee report was returned was thirty-four working days.

I'm not exactly sure what it is that they are referring to in terms of a claims memo, whether that's when the chest consultant gets it in his hands initially, because there may be a period...certainly will be, can be a period from the time a claim begins, a number is assigned to it and the time, then, that a claims adjudicator has some information on it either from an employer, from the worker's physician - that is, the other two forms that are needed, usually needed, almost always needed - information from the hospital and so on.

MR. LASKIN: Q. Is another...can I back you up a page in the Board's critique...is another area with which you take issue the question of referring claims to the ACOCD?

THE WITNESS: A. Yes.

Q. Because you make the point in your report, and I think you use the words 'there is an asymmetrical referral system, depending upon what the worker's family doctor may or may not say', and I apprehend the Board's position paper, and also particularly the evidence that the Board gave before us, is that what is really determinant in these cases is what the chest service has to say. Do you have any comment on that?

A. Yes. The argument is really not a terribly exciting one or dramatic one, but it is that the worker, a worker can raise a question. The question is, look, here I have a physician who says I have asbestosis, I feel sick. We send you this information and you in turn feel obliged to pass this on to some advisory committee to double check, to determine the credibility of my own physician.

A. (cont'd.) Now that will be the case, frequently be the case, where a physician in fact does say 'this worker has asbestosis...is seriously impaired, seriously disabled by asbestosis'.

I don't quarrel with that. I want to make that very clear. I think it would be...I, for one, think it would be unreasonable for the Board to simply act and provide compensation based on correspondence from a treating physician, personal physician. That I'm not arguing or quibbling that the Board should do that. I'm simply saying that as a practice, and in fact as a policy of the Board.

On the other hand, if the physician corresponds with the...as the physician will, submitting the Eight S form, with the chest consultant or through the claims process, and says, 'yeah, this guy is my patient and I've looked at him and he is in good health'.

In that instance I think the medical services staff are more often than not inclined to say, 'this physician probably knows what he is talking about, this physician doesn't have a sick patient and why the hell should we waste the time of the ACOCD'.

The reasons that one wants to check on a family physician, personal physician, are I think...you have heard it before...they may be inexperienced, they may not see enough cases, there may be a bias...who knows what...they may be too close to the patient. But those same arguments can be turned around and say, look, if the physician says this guy is in good health, maybe that physician is equally badly equipped to judge that his patient is indeed in good health, and my impression was, strong impression, that there was that kind of different response.

In effect, I think that I am surprised that there is strong objection to that here because I thought in discussions that I had with the staff that they acknowledged that that could

A. (cont'd.) easily be the case.

Maybe I shouldn't pursue that...

Q. I take it you would argue for...at least in respect of asbestosis claims...that the medical services branch would in effect be a conduit pipe?

A. That's right. I think I would be less...I would be more leery of recommending that, that every case but the most obviously unreasonable ones go to the ACOCD or whatever may succeed it if anything does. I would be more wary of recommending that if I hadn't been told that in Quebec they recommend all their cases, they would not do that - they don't do that, they feel no need to do that, and all their cases do go to their body that makes the determination initially.

Q. And that system appears to have worked well in Quebec?

A. They were surprised when I reported to them that it didn't operate that way here in Ontario.

Q. It seems to me, though, that there then becomes also asymmetrical about the Ontario system, and that is that you have this very expert body, allegedly, the ACOCD, which is going to pass on all your asbestosis claims, but there doesn't appear to be the same kind of quality check and quality control on all the cancer cases which, certainly from the evidence we've heard, are assuming much more significance...at least in terms of asbestos... than the asbestosis cases.

Do you see that as a problem?

A. Certainly it raises some questions, and whether that is asymmetry or not, I'm not sure. But it certainly suggests that there is no parallel, or that the two processes don't work the same way.

On the other hand, you might argue, look, the majority of cases that come before the WCB don't go to anything like an ACOCD,

A. (cont'd.) so maybe what we ought to do is not have an ACOCD, and I certainly wouldn't do that. I would prefer, if anything, more expert judgement on all these difficult industrial disease cases - not just the asbestosis ones.

MR. LASKIN: I have exceeded my time limit, Professor Barth. I thank you very much and turn you back to the Commissioners.

DR. DUPRE: Are there any questions, Dr. Uffen? Dr. Mustard?

(REPORTER'S NOTE: Both commissioners nod negative response.)

DR. DUPRE: Just one question, if you will indulge me, Professor Barth. When I turn my attention to the White Paper compensation scheme, and of course when I bear in mind the extent to which your own report has made me very sensitive to the issues of impairment as distinct from disability, an initial reaction that is going through my mind at the moment is that if it were to turn out that the exposure draft legislation in the White Paper became law in Ontario, basically the kind of process that you have so well described where asbestosis is concerned would remain in place, but at this juncture presumably solely to determine the impairment part of the compensation.

As I would see it at this juncture, the matter of the socioeconomic disability pension, if any, would be a matter that would very much involve, as distinct from the medical services division, the claims branch.

Now, at this juncture I can, in my mind's eye, see a situation where quite possibly the claims branch, with of course this new decision-making area, would certainly have to set up shop so that it would, of course, be able to try to cope with the measurement of socioeconomic disability, and I appreciate that the measurement of such disability is not problem free, although I also

DR. DUPRE: (cont'd.) consider it feasible.

But at this point the following consideration starts to bother me a little bit, and it takes the shape of the following proposition: that the measurement of the socioeconomic disability of an individual who has been told that he has a progressive disease may have to be sensitive to this and in this sense, perhaps, involve a departure from how you would measure the socioeconomic disability, say of an individual who lost a hand, and it's at this point that I become puzzled because I start to ask myself the extent to which we may find that it is the claims branch that is trying to measure socioeconomic disability that has to wind up facing up to one of the very issues that the current ACOCD and medical side can't deal with, or has not seen fit to deal with - namely, that whole issue of physical impairment versus attitudinal impairment.

Do you have any words of wisdom to give me as I wander in and out, not too coherently, about this problem?

THE WITNESS: I confess I'm very glad you asked the question, although I don't have a good answer.

I think if your concern, if Dr. Mustard's concern as he expressed it this morning, is correct - that there are these attitudinal consequences, being so informed...this makes me sound too much like a social scientist and I apologize for that...which I am...but it says to me that it would be very desirable for someone - likely the Board and likely not this Commission because of your lifespan - to very quickly try to measure to what extent this phenomenon is real, widespread and then built that in to the procedures...when I say build it into their procedures, I mean to take that into account as they estimate it...maybe that's too simplistic to say, look, it's there or it's not there, but I heard you say that it is - I gather Dr. Mustard has a similar concern, and I'm not familiar with the literature that demonstrates it. Not to say it isn't there, I just haven't been sensitive to it, haven't

THE WITNESS: (cont'd.) searched for it.

To the extent that it is, it seems to me that that ought to be something that the Board should know of, and I suppose could build-in to, then, the consideration of the people on the claims side who make the estimate of the value of the socioeconomic problems.

That means one more study, but now in terms of timetables and whatever, I don't think it necessarily could be done within the lifespan of this Commission. It certainly could be recommended.

DR. DUPRE: Which at this point brings me to the lifespan of this Commission, counsel. Do I take it that Professor Barth's appearance today exhausts the witnesses concerning whom you conferred with the parties on calling?

THE WITNESS: I believe so, Mr. Chairman, certainly speaking for myself. I don't propose to call any more witnesses at this stage, and I believe the parties can speak for themselves, but I believe that is also the extent of the parties'. There still remains the question of making final submissions, either orally or in writing or in some combination thereof.

DR. DUPRE: I think that with respect to the filing of submissions, either orally or in writing, the Commission is glad to leave that to you to confer with the parties on.

I take it with respect to witnesses there is no witness that the parties believe should be called at this time?

Fine. Well, that being the case, that does take me to our timetable, and it gives me an opportunity to divulge that in public in a way that we can then respond to, or at least in a way where we can there report more widely through our newsletter. You may recall that in November of 1980, I made a speech at our first public meeting, whose text was widely distributed, that promised a report from this Commission by

DR. DUPRE: (cont'd.) September of 1982, which is this month. I am now, of course, going to eat those words, as I very properly should, in public, and if I need any excuse, I will simply refer back to that same written document which I think, if it is checked, will bear out that I held out September of 1982 in a context where the hearings would wind up by February of 1982, at the latest.

Now, our hearings for good and sufficient reasons, have gone about seven months overtime. The statement that I now will make about the timeframe of our report is that the Commission will exert every effort to see to it that the report will be ready seven months after the end of the hearings, which very conveniently would also coincide, I believe, with the end of the current provincial fiscal year, which makes it, if you want a date, March 31, 1983.

MISS JOLLEY: Or April 1st.

DR. DUPRE: Then there's all the delays for the printing and so on, so March, 1983, is now our target date, and may I now please, Professor Barth, express very warm gratitude to you, not only for your appearance here today, but of course for the quality of your study, which infused so many of our hearings and so many of our considerations with so much more body than they otherwise would have had. We are indeed very, very grateful to you, sir.

THE WITNESS: Thank you very much.

DR. DUPRE: The Commission now stands adjourned.

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THE INQUIRY ADJOURNED

THE FOREGOING WAS PREPARED
FROM THE TAPED RECORDINGS
OF THE INQUIRY PROCEEDINGS

EDWINA MACHT